IN THE

Supreme Court of the United States

———————TERM, 1944

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NO.———

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C. B. KENNEMER, ET AL, *Petitioners*

VS.

C. B. BILLINGTON, ET AL, *Respondents.*

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Petition for Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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SUPPORTING BRIEF

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To The Honorable, The Supreme Court Of The United States:

In support of their petition for writ of certiorari, the Petitioners respectfully show to the Court:

1.

OPINIONS OF THE COURT BELOW

The District Court filed no opinion in the cause. The opinion of the United States Circuit Court of Appeals has not been reported, but appears at page 253 of the record and in the appendix hereto.

2.

(a) The opinion of the United States Circuit Court of appeals for the Fifth Circuit was handed down on March 28th, 1944; petition for rehearing was denied on May 2nd, 1944.

(b) This Court has jurisdiction of this cause under Title 28, U. S. C. A., Section 347-a, and under subsection 3 of Paragraph 5 of Rule 38 of the Court Rules of the Supreme Court of the United States.

(c) The jurisdiction of this Court is invoked upon the following grounds:

(1) In holding that a deed upon a homestead may be executed in blank by a husband and wife, and that the name of the grantee in said deed and the description of the property sought to be conveyed may be later added, and that a notary public may attach his certificate thereto without either of the parties having personally appeared before such notary, the United State Circuit Court of Appeals decided an important question in conflict with Sec-

tion 52, Article 16 of the Constitution of the State of Texas, and in conflict with Articles 1288, 1300, 3995 and 6605 of Vernon's Annotated Texas Statutes, and in conflict with the well settled line of decisions of the Supreme Court of the State of Texas and particularly in conflict with *Robertson, et al, vs. Vernon, et ux*, 12 S. W. (2d) 991, and in conflict with the decisions of this Honorable Court and particularly in conflict with *Drury vs. Foster*, 2 Wall. 24, 34, 17 L. Ed. 780, as will be hereinafter more fully set out.

STATEMENT OF THE CASE

On October 28, 1929, C. B. Kennemer and wife, Lottie Kennemer, and for many years prior thereto, were the owners in fee simple of approximately 210 acres of land in Wood County, Texas, which they occupied as their homestead. All of said land, with the execption of 40 acres, was the community estate of the said C. B. and Lottie Kennemer. On about said date of October 28, 1929, a purported mineral deed was executed by them to C. D. Davis, an agent of respondents. Lottie Kennemer died August 18, 1942.

On January 2, 1943, by their first amended original petition, the said C. B. Kennemer and the heirs of Lottie Kennemer filed their suit in the United States District Court for the Eastern District of Texas against respondents, seeking to cancel the mineral deed above referred to, for the reason that the deed was executed in blank, in

that (1) there was no grantee named in the deed at the time of its execution, (2) there was no description of the property purported to be conveyed, and (3) neither of the Kennemers appeared in person before a notary public to acknowledge the same.

Respondents answered this petition and denied the allegations of the Kennemers, specifically pleading that the deed was in all things regular at the time it was executed; that if this mineral deed when executed was in blank, as alleged by petitioners, that they had no notice thereof and that they were therefore innocent purchasers; that if the deed was so executed, which they denied, that it was seubsequently filled in in accordance with the directions of the said Kennemers. That if said deed was so executed, that they were purchasers in good faith, without fraud, paying a valuable consideration therefor, and that said deed was binding and operative according to its provisions; that if said deed was executed as alleged by petitioners that it was subsequently ratified by an instrument dated July 14, 1942; that petitioners having long recognized, ratified and confirmed the validity of this mineral deed and having induced respondents to believe in and rely upon its validity and having failed to undertake to disaffirm the same within a reasonable time, were estopped from attacking same.

The cause was tried before the Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas, on February 16, 1943, without the ser-

vices of a jury, and upon the conclusion thereof and on February 26, 1943, the court made the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW (R. 238-245)

This cause, having been tried before the Court without the intervention of a jury, and the Court having heard and considered the pleadings, evidence, and argument of counsel finds the facts, and states the conclusions of law as follows, to-wit:

FINDINGS OF FACT

1. On October 28, 1929, plaintiff, C. B. Kennemer, and his wife, Lottie Kennemer (now deceased), were the lawful owners, in fee simple title, of the following described land and premises, to-wit:

> FIRST TRACT: Situated in Wood County, Texas a part of the Manuel Y'Barbo League and Labor Grant, in the Northwest portion of a certain 200 acre tract of land which was conveyed by Conde and H. W. Reguet on May 27, 1850, and BEGINNING on the W B L of the said 200 acre tract at the S. W. corner of a 10 acre tract owned by the Estate of A. J. French, deceased, said corner being 357 feet (128.5 vrs.) South of the N W corner of the said 200 acre tract, this corner being at the N W corner of said Kennemer's fence; THENCE S. along and with a fence on the W. B. L. of said 200 acre tract, 1325 feet (477 vrs.) a stake near fence corner North,

South and East; THENCE N. 88 deg. 50′ E. 1362 feet (490.5 vrs) to a stake near fence corner at the western terminus of a lane, being the N. W. corner of a tract now owned by Lemuel C. Darby; THENCE N. 0 deg. 28′ W 1294 feet (465.8 vrs); THENCE N. 89 deg. 52′ W 1351.5 feet (486.5 vrs) to the place of beginning, containing 40.78 acres.

SECOND TRACT: Situated in Wood County, Texas, BEGINNING at the N. W. corner of the Joseph Knight Survey on the E B L of the Manuel Y'Barbo Survey, said corner being in the intersection of rods North, South and East, THENCE N. 89 deg. 40′ E. along with the N B L of the said Knight Survey, and along road 1325 feet (477 vrs) to a stake at the South edge of the road, being the N. W. corner of lands now owned by E. L. Faulk; THENCE S. 0 deg. 45 E. along and near the fence line 1667 feet (600.1 vrs) to a stake at the S W corner of the Faulk tract, about 3 feet East of the S. W. corner of the fence; THENCE N. 89 deg 30′ E. 1326 feet (477.4 vrs) to a stake on the East side of a ditch and about 30 feet E. of the S. E. corner of the fence; this being a Southeast corner of the Faulk land; THENCE N. 210 feet(75.6 vrs) to a stake at the South end of an old lane; THENCE S. 89 deg. E. along old road, and approximately 24 feet south of and parallel with the fence, 1049 feet (377.6 vrs) to a stake, being the NW corner of the T. D. Yates tract of land; THENCE S. 0 deg. 11′ West, 1491 feet (536.8 vrs) to Yates' S W corner on the S B L of the said Knight Survey, a stake at corner of fences, North, East and West; THENCE N. 89 deg. 45′ W. along said boundary line and with a fence, 1028 feet (370.1 vrs) to a stake, a large rock pile at the N W corner of the fence; THENCE S. 213 feet (76.7 vrs) to a stake at the S E

corner of the fence; THENCE S. 89 deg. W. 865 feet (311.4 vrs) to a stake at fence corner East, West and North, being the most northerly S E corner of a certain tract of 31.3 acres which was conveyed by C. B. Kennemer and wife to T. R. Lloyd on the 29th day of December, 1919, the said tract being later acquired by T. Gilbreath; THENCE N. 4 deg. 15′ West 483 feet (173.9 vrs) to the N E corner of the said tract deeded by Kennemer to Lloyd; THENCE South 89 deg. West near a fence, 1798 feet (647.3 vrs) to the N W corner of the said tract deeded by Kennemer to Lloyd on the E B L of the Y'Barbo Survey, a stake near the West side of the road; THENCE N 0 deg. 0′ East with the E B L of the Y'Barbo Survey and the West Boundary Line of the Knight Survey, 2721 feet (979.6 vrs) to the beginning, containing 161.65 acres; 157.35 acres being on the Knight Survey and 4.3 acres on the Townsend Survey.

2. On the date aforesaid the said Lottie Kennemer owned an undivided one-half interest in the land hereinbefore described as First Tract as her separate and individual property and estate. The remaining undivided one-half interest in said First Tract, and all of the land hereinbefore described as Second Tract, constituted the community property and estate of the said C. B. Kennemer and wife, Lottie Kennemer.

3. The land and premises above described constituted the homestead of C. B. Kennemer and wife, Lottie Kennemer, on October 28, 1929, and continued to be their homestead until the death of the said Lottie Kennemer

in August, 1942. Since her death plaintiff, C. B. Kennemer, has continued to reside upon said land.

4. On October 28, 1929, the said C. B. Kennemer and wife, Lottie Kennemer, made, executed, and delivered unto C. D. Davis a deed of conveyance wherein and whereby said grantors sold and conveyed unto said grantee an undivided one-half interest in and to all the oil, gas and other minerals in and under and that may be produced from the above described land and premises, subject to any valid lease of prior date, but covering and including one-half of the rentals and royalties payable under the terms of said lease, and containing covenants of general warranty. Said deed was prepared upon a printed form, but prior to the execution and acknowledgment thereof by the grantors the various blanks contained in said printed form were duly filled in, including the names of the grantors and grantee, a complete description of the property affected, the interest therein conveyed thereby, and a recited consideration.

5. The grantors, C. B. Kennemer and wife, Lottie Kennemer, appeared before W. C. Stevenson, a duly qualified and acting Notary Public in and for Wood County, Texas, for the purpose of acknowledging the aforesaid conveyance. Thereupon said Notary Public duly took the acknowledgments of each of said grantors to said conveyance in the manner porvided by the Statutes of Texas for husband and wife, and duly so certified to same, as reflected by the certificate of acknowledgment affixed to said deed.

6. After execution and acknowledgment of said deed same was duly delivered and thereupon the grantee, C. D. Davis, paid to the grantors, C. B. Kennemer and wife, for such conveyance, a consideration of One Thousand Fifty ($1,050.00) Dollars in cash, which was a good and sufficient consideration.

7. The terms and provisions of said conveyance truly and correctly reflect the agreement and understanding of both grantors and grantee respecting the sale of said property, with the exception that said deed recites only the payment of a nominal consideration of Ten ($10.00) Dollars. No fraud was alleged or proven to have been practiced upon the grantors in any particular whatsoever respecting said transaction.

8. C. B. Kennemer and wife, Lottie Kennemer, recognized and confirmed the validity of said conveyance by their subsequent acts and conduct, as evidence of which:

(1) In the year 1940 they refunded one-half of the cash consideration theretofore paid them to T. A. Wright, Lessee in an oil and gas lease executed by them covering said land and premises, when the Lessee directed their attention to the fact that they had previously conveyed an one-half interest in the oil and gas rights thereunder by virtue of the aforesaid conveyance to C. D. Davis; and

(2) By the execution, acknowledgment, and delivery by the said C. B. Kennemer and wife, Lottie Kennemer, of an instrument dated July 14, 1942, purporting to cor-

rect the description of the land and premises affected by said conveyance previously executed by them in favor of C. D. Davis, dated October 28, 1929, wherein it is recited that said previous conveyance "remains and is in full force and effect".

9. The acknowledgments of said grantors to said instrument dated July 14, 1942, was duly taken by W. D. Suiter, a duly qualified and acting Notary Public of Wood County, Texas, in the manner prescribed by the Statutes of Texas for husband and wife, and so certified by said Notary Public. The said Lottie Kennemer did not state or indicate to the said Notary Public that she had unwillingly executed or acknowledged such instrument.

10. No claim or contention was made by C. B. Kennemer and wife, Lottie Kennemer, that said conveyance which they had executed in favor of C. D. Davis, dated October 28, 1929, was in any wise invalid or irregular previous to the death of the said Mrs. Lottie Kennemer in August, 1942, and until shortly before the institution of this suit, and no repudiation or renunciation of said conveyance was undertaken by any one until shortly before the institution of this suit.

11. The defendants, C. B. Billington and J. C. Gilbreath, had previously engaged C. D. Davis to procure for them the oil, gas, and mineral interest evidenced by said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of the said C. D. Davis, dated

October 28, 1929, and pursuant thereto the said C. D. Davis sold and transferred said interest unto the said C. B. Billington by conveyance and assignment dated October 29, 1929, for which the said Billington and Gilbreath paid to the said C. D. Davis the sum of One Thousand One Hundred Fifty-five ($1,155.00) Dollars in cash, same being a good and sufficient consideration.

12. Until immediately prior to the institution of this suit none of the defendants had any notice or knowledge of any claim or contention that said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated October 28, 1929, was invalid or irregular in any respect.

13. A producing oil well was completed upon the land involved in this cause in June, 1942, same being the discovery well in the area in which said land is situated. Since said date four additional producing oil wells have been completed upon said lands involved herein.

14. Mrs. Lottie Kennemer died intestate in Wood County, Texas, in August, 1942. The plaintiffs herein constitute her surviving heirs at law.

15. The oil, gas, and mineral, and royalty interests covered and affected by said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated October 28, 1929, are now held and owned by the defendants herein.

CONCLUSIONS OF LAW

1. The oil, gas, and mineral, and royalty conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, in favor of C. D. Davis, dated Oct. 28, 1929, is in all things valid and binding, according to the terms and provisions therein contained.

2. The defendants are the lawful owners and holders, in fee simple, of an undivided one-half interest in and to the oil, gas and minerals in and under and that have heretofore been and may hereafter be produced from the land and premises hereinbefore described, topether with the proportionate part of the royalties and rentals accruing from any valid lease covering and affecting such undivided interest.

3. That plaintiffs shall recover nothing by this suit and judgment be entered accordingly.

DATED, this the 26th day of February, A. D. 1943.

(S) RANDOLPH BRYANT,
Judge.

Filed Feb. 26, 1943.

Petitioners perfected their appeal to the United States Circuit Court of Appeals, and on March 28, 1944, that Court offirmed the court below (R. 253). They seasonably filed their petition for rehearing, which was denied without written opinion on May 2, 1944. By successive stays of mandate, the United States Circuit Court of Appeals

for the Fifth Circuit has stayed all proceedings on its judgment pending this petition for certiorari.

SPECIFICATION OF ERROR

1.

The Court's finding (Findings of Fact No. 4, p. 241 R.) that the deed in question was prepared upon a printed form but prior to the execution and acknowledgment thereof by the grantors, the various blanks contained in said printed form were duly filled in, including the names of the grantors and grantee, a complete description of the property affected, the interest therein conveyed thereby, and recited consideration, was (1) not supported by any substantial evidence and (2) against the clear weight of the evidence, and was, therefore, clearly erroneous.

2.

The finding of fact of the trial court (Findings of Fact No. 5, p. 241 R.) that C. B. Kennemer and Lottie Kennemer appeared before C. W. Stevenson, a duly qualified and acting notary public in and for Wood County, Texas, for the purpose of acknowledging the aforesaid conveyance, and that they duly acknowledged the same before said notary public in the manner provided by the statutes of the State of Texas, as reflected by the certificate of acknowledgment affixed to said deed, was (1) not supported

by any substantial evidence (2) was against the clear weight of the evidence and was, therefore, clearly erroneous.

3.

The finding of fact of the trial court (Findings of Fact No. 6, p. 242 R.) that said deed was duly and regularly delivered to C. D. Davis for a valuable consideration, was (1) not supported by any substantial evidence (2) was against the clear weight of the evidence, and was, therefore, clearly erroneous.

4.

The finding of fact of the trial court (Findings of Fact No. 7, p. 242 R.) that the terms and provisions of said conveyance truly and correctly reflected the agreement and understanding of the grantors and grantees, respectively, with the exception of the consideration recited therein that no fraud was alleged or proven, was irrelevant and immaterial and, therefore, clearly erroneous.

5.

The finding of fact of the trial court (Findings of Fact No. 8, p. 242 R.) that C. B. Kennemer and wife, Lottie Kennemer, recognized and confirmed the validity of said conveyance by their subsequent acts and conduct, as evidenced of which:

(1) In the year 1940 they refunded one-half of the cash consideration therefor paid them to T. A. Wright, lessee in an oil and gas lease executed by them covering said land and premises, when the lessee directed their attention to the fact that they had previously conveyed an one-half in the oil and gas rights thereunder by virtue of the aforesaid conveyance to C. D. Davis; and

(2) By the execution, acknowledgment and delivery by the said C. B. Kennemer and wife, Lottie Kennemer, of an instrument dated July 14, 1942, purporting to correct the description of the land and premises affected by said conveyance previously executed by them in favor of C. D. Davis, dated October 28, 1929, wherein it recited that said previous conveyance "remains and is in full force and effect", was clearly erroneous, in that (1) the deed from Kennemer and wife to C. D. Davis was void and incapable of reformation; (2) the actions of said petitioners in refunding one-half of the purchase price of said lease as alleged was not such an act under the laws of the State of Texas as would amount to a confirmation of said deed; and (3) that the instrument executed by Petitioners on July 14, 1942, purporting to correct the description of the land and premises affected by said previous conveyance executed by them in favor of C. D. Davis, dated October 28, 1929, specifically stated upon its face that the only purpose of this instrument was to correct the field notes and that no other part, parcel or feature of the deed dated October 28, 1929, was to be affected, in that under the laws

of the State of Texas an insrument purporting to ratify a deed must specifically state what part of the deed is ratified and that all features of the deed sought to be ratified remain in full force and effect other than that actually covered by the ratifying instrument; and for the court to find that such action on the part of the Petitioners ratified or attempted to ratify the defectiveness of the deed hereofore pointed out was clearly erroneous, in that such actions on the part of Petitioners, if true, would not constitute a ratification of the mineral deed under the laws of the State of Texas.

6.

For the court to find as a fact (Findings of Fact No. 10, p. 243 R.) that no claim or contention was made by the Petitioners that the conveyance executed in favor of C. D. Davis on October 28, 1929, was in any wise invalid or irregular previous to the death of the said Lottie Kennemer in 1942, and until shortly before the institution of this suit, and that no repudiation or renunciation of said conveyance was undertaken until shortly before the institution of this suit, was (1) not supported by any substantial evidence and (2) was against the clear weight of the evidence, was, therefore, clearly erroneous.

7.

The finding of the Court (Findings of Fact No. 10, p. 243 R.) that no claim or contention was made by the

Petitioners that the conveyance executed in favor of C. D. Davis on October 28, 1929, was in any wise invalid or irregular previous to the death of said Lottie Kennemer in 1942, and until shortly before the institution of this suit, and that no repudiation or renunciation of said conveyance was undertaken until shortly before the institution of this suit, was against the clear weight of the evidence and, therefore, clearly erroneous, because it was undisputed and was so found by the court (Findings of Fact No. 3, p. 241 R.) that the land in question constituted the homestead of C. B. Kennemer and Lottie Kennemer, owned and occupied by them as such, which fact is due notice of any claim or claims that the said Petitioners might have or assert therein.

8.

Such finding of fact No. 10 is irrelevant and immaterial and has no proper bearing upon the issues here involved.

9.

The finding of fact of the trial court (Findings of Fact No. 12 p. 244 R.) that until immediately prior to the institution of the suit, none of the defendants had any notice or knowledge of any claim or contention that said conveyance executed by Petitioners on October 28, 1929, was invalid or irregular in any respect, was (1) not supported by any substantial evidence (2) was against the clear

weight of the evidence, and was, therefore, clearly erroneous.

10.

The finding of fact of the trial court (Findings of Fact No. 12, p. 244 R.) that until immediately prior to the institution of the suit, none of the defendants had any notice or knowledge of any claim or contention that said conveyance executed by Petitioners on October 28, 1929, was invalid or irregular in any respect, is against the clear weight of the evidence and is, therefore, clearly erroneous, in that (1) the court found as a fact (Findings of Fact No. 3, p. 241R.) that the land in question was the homestead of Petitioners and at all times during the interval between the execution of the deed and the trial of the cause was occupied as such, and (2) the court found as a fact (Finding of Fact No. 11, p. 243 R.) that C. D. Davis was the agent of Respondents' and as a mater of law, any knowledge had by Davis of irregularities of the deed executed by the Petitioners to appellees as hereinfore alleged was binding upon the Petitioners, and it is undisputed that Davis was fully aware of such.

11.

For the court to conclude as a matter of law (Conclusion of Law No. 1, p. 244 R.) that the oil, gas and mineral and royalty conveyance executed by C. B. Kennemer and

wife, Lottie Kennemer, in favor of C. D. Davis, dated October 28, 1929, was in all things valid and binding according to the terms and provisions therein contained was (1) not supported by any substantial evidence, (2) was against the clear weight of the evidence and was therefore, clearly erroneous.

12.

The conclusion of law (Conclusions of Law No. 2, p. 244 R.) that Respondents are now the lawful owners and holders in fee simple of an undivided one-half interest in and to the oil, gas and minerals in and under and that have heretofore been and may hereafter be produced from the land and premises hereinbefore described, together with the proportionate part of royalties and rentals accruing, was (1) not supported by any substantial evidence , (2) was against the clear weight of the evidence, and was therefore, clearly erroneous.

13

The Court erred in failing and refusing to allow Mrs. Bernice Robinson, a witness called by Petitioners, to testify that the day Mrs. Kennemer died, she came to witness' house with Judge Puckett, one of the lawyers for Petitioners, and asked the witness if she recalled that the day Judge Cuiter came to get her to sign the instrument containing the corrected field notes, that Mrs. Ken-

nemer told Judge Suiter that she would sign this instrument but didn't want to and that she had signed the last paper she intended to sign not knowing what she was signing (R. 155, 157), for the reasons that (1) it is contended by appellees and so found by the Court (Finding of Fact No. 10, R. 243) that prior to Mrs. Kennemer's death she had not denied that validity of the mineral deed, nor had she made any attempt to cancel or set it aside; and (2) it was a material declaration of a deceased person, that Mrs. Bernice Robinson was not interested in the transaction, was competent to testify, and this testimony could not have been given by Kennemer himself. That in this connection, Petitioners contend that Puckett, being one of the lawyers for Petitioners, was at that very time, in company with Mrs. Kennemer, interviewing witnesses for the purpose of filing this particular suit.

14.

It being the contention of Petitioners that the mineral deed here in question and all other mineral deeds taken by C. D. Davis and W. O. Craddock were taken in blank in so far as the grantee to be named was concerned, at the instance and request of Respondents, and that one of the Respondents J. C. Gilbreath, having testified that he had given no such direction but, on the contrary, had directed that they be taken in the name of C. B. Billington as grantee, the Court erred in failing and refusing to allow Milo Cain to testify that the agreement between

Davis and Gilbreath was that the mineral deeds were to be taken in blank in so far as the grantee to be named was concerned (R. 232, 236).

15.

The Court erred in entering a judgment for Respondents herein and failing and refusing to enter judgment for Petitioners, for the reason that under the evidence that was adduced at the trial, it was the plain duty of the Court to enter judgment for Petitioners as prayed for by them.

PROPOSITIONS RELIED UPON

1.

In order that an instrument purporting to convey title to land or an interest or estate in land may be valid as a deed and operative to pass such title to or interest in land, it is essential that there be a grantor and grantee and a thing conveyed, and therefore (1) a deed signed by the purported grantors in which there is contained no grantee is void; and (2) a deed signed by the purported grantors which does not contain a description of the thing sought to be conveyed is void.

2.

Where a married women does not appear in person before a notary public and acknowledge the execution

of an instrument purporting to convey an interest in a homestead in accordance with the statutes of the State of Texas, such instrument is void and has no force or effect.

3.

Where a married woman does not in fact appear in person before a notary public and acknowledge the execution of an instrument purporting to convey an interest in a homestead, under the laws of the State of Texas, there is no presumption in favor of the correctness of the recitations of the notary's certificate.

4.

An instrument purporting to convey an interest in real property that is void and not voidable is incapable of being reformed and ratified.

5.

An instrument purporting to be a ratification of a deed must specifically point out and state in what particular such instrument purports to ratify and confirm, and has no effect upon any irregularities not specifically pointed out and ratified in such instrument of ratification and reformation.

6.

A principal is bound by any notice which his agent might have of the irregularities in the execution of a deed.

7.

In the State of Texas the occupancy of land is constructive notice to the world of whatever interest of whatever character and to what extent such occupants claim in such land.

8.

One can not by verbal instructions give to another authority to add the name of grantee to and place the description of lands attempted to be conveyed in a deed theretofore signed in blank, and a deed so completed is void as against the statute of frauds of the State of Texas, and contrary to the Constitution and laws of Texas, governing the homestead.

ANALYSIS OF THE EVIDENCE

Petitioners feel that, since the sufficiency of the evidence and the complete lack thereof to support the findings of the court is so vital to their, petitioners, appeal, a complete analysis of such evidence is deemed necessary.

C. D. Davis, a witness called by petitioners, testified that he met J. C. Gilbreath in 1929 through a Mr. Milo

Cain, a banker at Winnsboro. That Mr. Cain called him to the bank where he met Mr. Gilbreath, and Mr. Cain explained to him that Mr. Gilbreath wanted to employ him to secure some oil royalties within a specified limitation around the Coke community in Wood County, Texas. That the sum and substance of the agreement finally reached between the witness and Gilbreath was that Davis was to buy oil royalties within the area specified, and Davis was to receive fifty cents per acre for all royalties purchased as his commission. That an arrangement was completed with the bank whereby Davis was to buy the royalties and give his check in payment. That he bought royalties for Gilbreath at an aggregated cost of approximately $14,000, for which he gave his own checks. That C. B. Kennemer's 210 acres was within the specified boundaries designated by Gilbreath. That Davis called C. B. Kennemer at his home in Como and made an appointment with him to meet him at Coke's store, and met him there on Saturday morning. That he had a discussion with Mr. Kennemer with reference to purchasing his royalty and made a tentative agreement with him, subject to the approval of Kennemer's wife, and that Kennemer was to meet Davis in his office in Winnsboro the following Monday. That on the date appointed Kennemer came to the office in Winnsboro and brought several deeds, from which the description of Kennemer's land was to be taken. That Kennemer came to his office in Winnsboro at about twelve o'clock on the Monday morning and brought his wife with

him. That he had a blank royalty deed and Kennemer and his wife signed it. That there was no description of the land in the deed. That the only thing that was added in the deed at the time Kennemer and his wife signed it was the grantors' names and the amount of the royalty being purchased (R. p. 32) and the deed was dated. That C. W. Stevenson, who appears as the notary executing the notary's certificate to the royalty deed in question, was not in Davis' office at any time during that day while the Kennemers were there. That Kennemer stated that he was in quite a rush when he brought the deeds in, that he had to leave and wanted to get out of town immediately, that he was leaving on a train and was going one way and his wife the other. That Davis handed him the instrument and Kennemer and his wife signed it. That they left the deed there with the witness, and the witness gave Kennemer a check for $1,050, and he and his wife left the office (R. p. 33). That Davis and Mr. Craddock added the field notes to the deed after Kennemer and his wife had signed it, late that afternoon or that night.

"Q. Tell the judge how the acknowledgment got on there.

A. We filled out those field notes.

Q. You mean you and Mr. Craddock?

A. Yes, sir. I don't use the typewriter myself. Mr. Stevenson was in the office and I handed the instrument

to him and told him to put the acknowledgment on it and we fixed it up.

Q. You told him they signed it in your presence?

A. Yes, sir.

Q. He signed the acknowledgment and put the seal on there the next morning?

A. Yes, sir." (R. p. 33-34)

On cross-examination Davis testified that he had had very little experience in taking oil and gas leases, that he had taken some, but a very few. That Davis accepted the engagement from Gilbreath to go out in the Coke community and procure these mineral deeds. That Gilbreath just turned the matter of trading with the land owners over to him. That Mr. Billington was not in Winnsboro at the time in so far as the witness knew. That Davis had been a notary public himself and had taken a few acknowledgments. That he knew that ones who acknowledged deeds must appear before a notary in person, and that a married women must have her acknowledgment taken privily and apart from her husband and have the same explained to her. That he knew that Mr. Gilbreath was relying upon him to see that it was correctly done, but that Mr. Gilbreath had told him that Mr. Suiter would take care of the title. That neither Mr. Gilbreath nor Mr. Billington was present at the time the Kennemers signed the mineral deed. That O. W. Craddock and a Mr. Mc-

Crary assisted him in making the transaction with the Kennemers, and that Craddock did the typing in the preparation of the instruments. That Craddock owned a portable typewriter and they took it along with them and that in quite a few instances they prepared the instruments at Coke's store and at the residences of the parties with whom they dealt. That the instruments drawn on the portable typewriter were those that were done outside of the office, and the standard typewriter was usually used in the office. That the way he contacted Kennemer, he called him at Como. That his recollection was that it was Friday evening or Friday night when he called Kennemer to meet him at Coke's store on Saturday. That he made a tentative trade at Coke's store on the following Saturday with Kennemer to pay him $1,050 for a one-half royalty on the 210 acres. Nothing was said to Kennemer at that time about taking the acknowledgment, only that Kennemer was to meet him at Winnsboro the following Monday at noon. That at the time he first talked to Kennemer at Coke's store, he presumed that he would have to go to Como to take Mrs. Kennemer's acknowledgment, because she was living there at that time. That he was not expecting Kennemer to bring his wife with him to Winnsboro, and he had, therefore, made preparation to have her acknowledgment taken in Hopkins County. That immediately after he closed the deal with the Kennemers, he went back to the field, which would be around 12:30. That he and Mr. Craddock had both been in the field that morning and

had returned to the office in Winnsboro to meet the Kennemers, and that they only stayed in the office about thirty minutes and then went back to the field and that there was nobody in the office when they left. That Mr. Craddock had filled in what was contained in the blank mineral deed (the names of grantors and date) before the Kennemers signed it. That the witness did not know whether Craddock had filled it in in the office that night or in the field. That Craddock had given him the instrument Monday in order that he might stay at the office and get the Kennemers to sign it. That the deed was filled in on the typewriter with the exception of the field notes and Davis' name as grantee (R. p. 43). That he did not see anybody put any thing in the blank deed except the field notes; and that "We copied them that night and pasted them in there" (R. p. 44). That he did not know who filled in the name of C. D. Davis as grantee in the instrument. That he was sure that his name was not in the deed as grantee at the time it was signed (R. p. 45). That the following day (Tuesday) when it was called to his attention was the first time he knew that his name was added as grantee (R. p. 48). That upon such discovery he made an instrument in blank in which he assigned the interest acquired by him. (R. p. 46). That when he finally noticed the certificate of acknowledgment of Mrs. Kennemer, the word "Hopkins" had a line drawn through it and the word "Wood" written over it (R. p. 46). That he knew W. C. Stevenson and knew that he

was a notary public in and for Wood County, Texas, and had seen him take quite a few acknowledgments. That Mr. Stevenson is dead.

"Q. Are you certain that he (Stevenson) was not in the office the day Mr. and Mrs. Kennemer came in and signed this deed, Mr. Davis?

A. He wasn't there at the time they signed the deed, no, sir." (R. p. 47)

That the Kennemers both came to his office together. That he saw both the Kennemers sign the mineral deed; that Mr. Kennemer signed it first and then his wife signed it immediately. That nobody was present at the time they signed it in so far as he knew except Mr. and Mrs. Kennemer and himself. That the next day when he discovered that his name was added to the instrument as grantee, he made a written assignment in blank according to their instructions (R. p. 48). That the defendants' Exhibit 1 (D1-M) was the instrument that the Kennemers signed in his presence.

"Q. Now, what was the routine you followed in turning these papers over to Mr. Gilbreath?

A. Mr. Craddock completed all those papers. There were instructions for us to take them all in blank. He prepared and finished them all.

Q. You left the name of the grantee blank?

A. Yes, their instructions were not to put any name in there, their grantors signed and every thing was completed and Mr. Craddock carried those to Mr. Cain's bank to be closed, to be paid for, and they could put whatever name in they wanted to. That was the procedure that was taken on closing those.

Q. Was there any other of these royalty deeds taken in this whole transaction in your name besides this Kennemer?

A. No.

Q. That's the only one?

A. Only one.

Q. And as a consequence of that, the only assignment you executed was the one you executed in favor of Billington covering the Kennemer royalty, as evidenced by Defendants' Exhibit 1 I have just shown you?

A. That's correct." (R. p. 53)

That Mr. Gilbreath paid money to Davis' account to reimburse him for the money he spent for these royalties. That Defendants' Exhibit 2 represented a check for which the witness got a deposit. That he did not endorse the check but he got credit for it. That the endorsement on it appeared to have been written by Mr. Cain. That he, Davis, got the description which he placed in the royalty deed from the old deeds that Kennemer had left with him. That the deal he made with Kennemer was that he

gave them $1,050 for the lease and one-half of the royalty on the Kennemer 210 acres. That the lease was made to him, and that the grantee in the mineral deed was supposed to have been left blank. That at the time the mineral deed was signed by the Kennemers, they knew that the field notes had not been incorporated in it. That the Kennemer left the field notes with him for the purpose of writing the description of the property conveyed in the mineral deed. That there was no discussion between him and the Kennemers concerning the addition of anything in the blank mineral deed with the execption of the field notes (R. p. 58). That in so far as Davis' discussion with the Kennemers went, nothing was said to lead anybody to believe other than that Davis himself was buying the royalty interest. There was no understanding between the witness and Kneemer; that he didn't tell him he was buying it or somebody else was buying it; there was no understanding as to that. He simply bought the royalty and paid him the money that he asked for it.

"Q. The facts recited in the instrument truly reflect the trade you made with Mr. Kennemer?

A. It was being purchased by Mr. Gilbreath but the instructions were that it be left in blank. I didn't discuss with Kennemer whether I was buying it for Gilbreath, Craddock or Davis, just bought it and gave him a check for it." (R. p. 60)

That in all other respects the instrument reflects the trade made with the Kennemers. That Davis did not tell

Gilbreath that the mineral deed had been signed in blank because he had not talked to Gilbreath. That Craddock closed the deal with Gilbreath and got Gilbreath's check for $1,155 and placed it to witness' credit. That he did not tell Gilbreath at the time that this mineral deed was signed in blank because the instructions were that it was to be signed in blank (R. p. 60). That Davis took a lease in his own name on quite a few of the tracts the royalty of which he had purchased for Gilbreath. He did this in the Kennemer tract. That he did this about the same time that the mineral deed was executed. That Craddock took the acknowledgments on the leases that he had taken. That when the lease on the Kennemer tract was taken it recited "subject to any valid lease of record". That he did not tell Gilbreath that he had gotten a lease on the land also. That the first time he knew there was any thing irregular about the procedure of the Kennemers in the execution of the mineral deed was when he talked to Grisham and Lattimore in October (R. p. 64). That he had talked to A. U. Puckett about the mineral deed that was taken on George Kennemer's land, and that it was discussed that a deed signed in blank was of no value. That Davis did not make the statement in Messrs. Ramey & Calhoun's office that he had made a transaction with the Kennemers at Robinson's store in Coke and arranged that he and his wife would come to Davis' office in Winnsboro. That he did not remember making the statement that the trade was made on Saturday and Kennemer and

his wife signed the deed and that he was not present when they acknowledged it. That he could not say whether he made that statement or not. His best recollection was that he did not make the statement. Davis further testified that he could neither say yes nor no as to whether or not he had made the statement in the lawyers' office that he did not see the Kennemers sign the deed or either of them acknowledge it. That he could not remember whether or not he made the statement that he left the check for the consideration to be paid to Kennemer with Wortham Craddock.

"The Court: Why did you say that Mr. Craddock was in the field? I thought you said on direct testimony he was in the office.

A. I brought him into town and he took the car and went back to the field.

The Court: I thought you said you turned those deeds over to him.

A. That night. Mr. Kennemer left the deeds with me and he filled the field notes in that night." (R. p. 66, 67)

According to witness's memory, he told the lawyers that he did not remember at the time he talked to them in August the details of Kennemer and his wife's execution of the mineral deed in question. That that was the first time it was called to his attention and he had not

given it any consideration or thought. That he didn't know then that the suit had been filed.

"Q. I am talking about the basis of the suit.

A. It had not been called to my attention at all. When we were discussing the situation and you discussed the mineral deed, I thought you were talking about the mineral deed from me to Mr. Billington or Gilbreath, and it did not enter my mind you were talking about the mineral deed from Kennemer to me." (R. p. 68)

That Gilbreath and Billington had sued the witness, Davis, for the lease that he had taken in his name on the Kennemer tract, and that he had not felt kindly toward them. That he was acquainted with W. C. Stevenson's reputation for truth and veracity in the Winnsboro community in 1929 and that it was good but not above reproach.

RE-DIRECT EXAMINATION

That all the mineral deeds that were taken by Davis for Gilbreath and Billington, with the exception of the Kennemer tract, were taken in blank. Examined by the court, the witness testified that there was no different consideration for the mineral deed taken for Gilbreath and the lease taken for the witness; that he simply paid him $1,050 for the lease and royalty. That the suit that Gilbreath brought against him was dismissed. That they had sued him for the value of the lease and not for the

lease itself. That Gilbreath had made a straight deal with him to pay him straight $11.00 an acre basis for the royalty purchased. That he gave the Kennemers $1,050 and received credit from Gilbreath for $1,155.

O. W. CRADDOCK, called as a witness by petitioners, testified that he had lived in Winnsboro all of his life, was 46 years old, and was in the insurance business. That he was a partner of Davis in 1929 when the mineral deed was received from the Kennemers. That he was present when Kennemer came to Coke's store to meet Davis on Monday morning. That he assisted in the preparation of the mineral deed from the Kennemers but did not do all the typing contained in the deed. That he wrote "C. B. Kennemer and wife, Lottie Kennemer" and "Wood County" at Coke. That he did not type the name of C. D. Davis as grantee in the deed but did write "one-half", being the mineral interest conveyed. That he prepared the body of the instrument at Coke's store, including "All that certain lot, tract or parcel of land situated in Wood County, Texas, and being 210 acres of land described as follows". That he prepared the sheet upon which were contained the field notes to the property conveyed at his office in Winnsboro later in the day after the ordinary business hours or that night after supper (R. p. 74). That he did not write the name of C. D. Davis as grantee in the mineral deed. That there was no other typing in the blanks of the mineral deed at the time he turned it over to Davis with the exception of those that he placed in there himself.

That it was just around noon on Monday when he and Davis returned from the Coke Community. That he went home to lunch and after he had lunch, he went back to the Coke community by himself in his own car. That he did not see either of the Kennemers in Winnsboro the day he turned the deed over to Davis. That it was real late in the afternoon when he returned from the Coke community to Winnsboro.

"Q. When did you next see the document, this Plaintiffs' Exhibit 1, after you turned it over to Mr. Davis that morning?

A. It was after we went back in and were working out the details of the entire work we had been doing in the field. I couldn't say whether it was before supper or late in the afternoon or night. Some of it was done the next morning.

Q. That night or late in the afternoon, did it have the signatures of C. B. Kennemer and Lottie Kennemer at that time?

A. Yes, it was executed." (R. p. 77, 78)

That he prepared the field notes that were pasted on the mineral deed from the Kennemers from deeds which had been furnished him in the office after he had come back from the field in the afternoon. That when he made these field notes he made a carbon copy of them and pasted the carbon copy of the field notes on the oil and gas lease from the Kennemers to Davis.

"Q. At the time you put those field notes on that mineral deed, pasted those field notes on there, did it have any certificate of acknowledgment by Mr. Stevenson on it?

A. I don't recall just when, but some time in the preparation of it, I remember seeing that the certificate had not been completed, but I don't know just when it was. I may not have noticed it until—it may have been when we were checking them for notary seals before delivering them to the bank. I couldn't say.

Q. At any rate, after you got back in town and went to work on preparing these field notes, you discovered there was no certificate on it?

A. Yes, sir." (R. p. 78)

That he pasted the field notes on the deed at the time he prepared them and at the time it was finished. That he didn't know how Mr. Stevenson happened to put the notary's certifiate on the deed. That he noticed it and called Mr. Davis' attention to it. That he didn't know whether or not Mr. Davis' name had been placed in the deed as grantee at that time: "All of the deeds were supposed to be in blank" (R. p. 79). That up until a few days before October, 1929, Mr. Stevenson had been a partner to Mr. Davis and he still sort of made headquarters around the office. That he delivered to Mr. Cain an assignment from Mr. Davis to a blank grantee of the mineral interest obtained from the Kennemers. That Mr. Cain en-

dorsed Mr. Davis' name on the check from Mr. Gilbreath to Mr. Davis for payment for the Kennemer royalty.

On cross-examination, Craddock further testified that he was a partner of Davis for a little over a year beginning a few days prior to October, 1929, and to about the early part of 1931, and that he shared in the profits derived from all the transactions that Davis had with Gilbreath. That prior to his association with Davis, Davis had been Secretary of the Farm Loan Association at Winnsboro. That he and Davis were familiar with the handling of acknowledgments and signatures to instruments conveying interests in real estate. That he knew the legal requirements with reference to the procedure to be followed in taking acknowledgments of married women. That they had three typewriters in the office and he had a small portable. That the portable typewriter was a Remington, and the ones in the office consisted of a standard L. C. Smith with pica type, box type, a Remington that was different to that, and an Underwood that was more nearly the average and normal type. That they took the portable to the field with them. That many of the instruments that they took for Mr. Gilbreath were completed in the field or at the land owners' homes on the portable. That he thought that Kennemer came to Coke's store on Monday morning instead of Saturday to meet Mr. Davis, and that Davis made a preliminary deal with him for the royalty interest at that time. That the deal he made with Kennemer was conditioned upon it being agreeable with

Mrs. Kennemer. That it must have been eight or nine o'clock on Monday when he came to the store. That they agreed to pay Kennemer $5.00 an acre for one-half of his royalty and a lease, and the lease was to go to Davis.

"Q. Who was the royalty going to?

A. The trade was made with Mr. Gilbreath, but he had left the impression with us that it would probably go to some one else. I didn't know whose name would be inserted in the instrument". (R. 85)

That after Kennemer left, he filled out the body of the instrument on the portable typewriter, consisting of the names of the grantors and the residences where they lived, the name "C. B. Kennemer and wife", and the fact that there was a one-half mineral interest conveyed by the instrument, including also "The following described land situated in Wood County, Texas, to-wit: All that certain lot, tract or parcel of land situated in Wood County, Texas, and being 210 acres of land described as follows:" (R. 86). That was written in before Mr. and Mrs. Kennemer executed the deed. That he used the standard typewriters in the office when he was writing any thing there, and when he wrote any thing in the field he used the portable. That his best recollection was that they closed up all the deals that they had made for Mr. Gilbreath on that Monday that he believed to be the 28th day of October and delivered them to the bank to Mr. Cain the following day, which would be Tuesday. That after they had delivered

these instruments to Mr. Cain and about thirty or forty minutes or an hour later, Mr. Cain came down to the office and told them that the Kennemer deed had the name of C. D. Davis as grantee, and that it would be necessary to have a blank assignment, assigning the interest out of Davis. That the royalty deed from the Kennemers to Davis was completely filled out, including the notary's certificate, on the morning he took the deed to the bank. That the signature affixed to the notary's certificate is that of W. C. Stevenson. That the endorsement on the back of the mineral deed "C. B. Kennemer and wife to C. D. Davis" looks very much like Mr. Stevenson's writing. That Craddock delivered to Davis the Kennemer deed with the parts that he had theretofore filled in about noon on Monday and that night came in and prepared the field notes and inserted them in the instrument. That the name "C. D. Davis" in the third line of the instrument seems to be in the same type as "C. B. Kennemer and wife, Lottie Kennemer" in the initial line of the instrument; it looks like the same type but it is a little heavier, the inking is a little heavier.

"Q. You tell the court in your opinion that the words 'C. D. Davis' here which appears in the Plaintiffs' Exhibit 1 on the third line was written on the same portable typewriter that wrote 'C. B. Kennemer and wife, Lottie Kennemer'?

A. I wouldn't say the same portable typewriter. It appears to be the same type. The same type appears on the field notes.

Q. You wouldn't say the field note type is the same as the rest?

A. No, it is the same size" (R. 91)

That he didn't remember all the circumstances surrounding the taking of the twelve or fourteen other royalty deeds besides the Kennemer deed but that he probably could after having discussed it as much as he had the Kennemer transaction. That he did not tell Mr. Calhoun and Mr. Suiter that he didn't remember any thing about the transaction. That he did not recall telling Mr. Calhoun that he didn't remember any reference to the execution of the royalty deed from the Kennemers to Davis. That he did not recall specifically telling Mr. Calhoun that he didn't remember whether he prepared the Kennemer deed or not. That he told Mr. Calhoun and Senator Suiter about as much as he told Puckett and Mr. Lattimore. That he never did tell Mr. Gilbreath or Mr. Billington that there was any thing wrong with the Kennemer deed, because he didn't know there was anything wrong with it.

On re-direct examination the witness, Craddock, further testified that the first time he noticed that Mr. Stevenson's notarial certificate was not on the mineral deed was that night at the office when they were checking over all the deeds. That what he meant to tell Mr. Ramey on

cross-examination was that all the typing he did in the office was done on a standard typewriter, and that he did not mean to tell him that the typing others might have done on the deed was done on the standard typewriter, and that he didn't know whether the other blanks that were filled in by some one else were done on the standard typewriter in the office or on another typewriter at some other place.

RE-CROSS-EXAMINATION

On re-cross-examination, Craddock further testified that he prepared the field notes late in the afternoon or night. That he did not see Mr. Stevenson there that night. That after they had fixed the papers up, they left them in the office and he thought that he and Davis left about the same time, but did not remember who got to the office first the next morning. That he did not recall seeing Mr. Stevenson come in and write up the notary's certificate.

"The Court: You say according to your recollection the seal was not on there when you prepared those field notes that night, although the signatures were on there?

A. Yes, sir. That didn't raise a question with me for the reason it occurred to me that probably the notary wanted it in detail before he put on his seal. I don't think there was any discussion as to whether the acknowledgments were there. I didn't know but that the acknowledgments were regular but he didn't care to affix his seal until the instrument was completed". (R. 97)

That T. A. Wright, a witness for the defendant, might be accommodated, the court allowed the defendants to place him upon the witness stand, and he testified as follows: That he had lived in Wood County all of his life and was Vice-President and Cashier of the First National Bank at Winnsboro. That in 1940 he took a lease on the Kennemer land for S. E. Dunham, Jr., who assigned the lease to Amerada Petroleum Company, who now holds the lease on the Kennemer land and that it is now producing oil. That he paid Kennemer $2.00 an acre for the lease in 1940 or 1941. That Kennemer's wife, Lottie Kennemer, signed the lease with him. That a day or two after he had taken the lease he asked Kennemer if he hadn't sold some of his mineral interest and Kennemer agreed that he had, said he had sold one-half to a Mr. Billington.

"Q. Did you ask for a refund of half the consideration you paid him originally?

A. I talked to him and he later agreed.

Q. What did he say?

A. He said: 'I will pay you back the difference.'

Q. What did he pay you back?

A. $210.00." (R. 100)

That he later took a lease from Billington on the half that he and Gilbreath owned and assigned that to the Amerada.

On cross-examination the witness, Wright testified:

"Q. Aren't you mistaken about most of that, Mr. Wright? As a matter of fact, it was a good deal more than a day or two later and you went in the field and found him in the field and asked him about this mineral matter and he agreed and he did give you a check?

A. Either in his field or on the back street.

Q. They are twelve or fourteen miles apart, aren't they?

A. That's true." (R. 101)

"Q. When you went out you had been informed by Mr. Dunham or the Amerada that the abstract showed this Billington mineral deed?

A. Yes, sir.

Q. And you went out and told him of the fact and he told you he would hand you back half the purchase price and that was done and that was the end of it?

A. Yes, sir." (R. 102)

Milo Cain, called as a witness for petitioners, testified that he lived in Winnsboro, Texas, and owned and operated the Cain Banking Company. That J. C. Gilbreath came to his bank and stated that he wanted to purchase some royalty interests in the Coke community and wanted some one to represent him in these purchases. That he suggested Mr. Craddock, Mr. Davis and a Mr. McCrary

who lived in the Coke community. That Mr. Gilbreath wanted to pay fifty cents an acre as a commission to some one who would purchase royalties for him, and that the witness called Mr. Davis and Davis said he would have to have a couple of hours to think it over. That Davis subsequently came back, and they reached an agreement, after some argument, that Davis was to buy one-half of the royalties under the lands at $5.00 per acre and that Davis was to receive fifty cents per acre as his commission. That Gilbreath put money on deposit in his bank to pay for the royalties. That Gilbreath was in and out of the bank during the time that Davis and Craddock were representing him in the purchase of these royalties. Before any money had changed hands between Gilbreath and Davis, Craddock and Davis had brought all the mineral deeds into the bank. That Gilbreath wrote a check payable to Davis for the amount involved in the purchase of the royalties and he endorsed Davis' name on the check and deposited that amount to his credit. That he had theretofore created an overdraft in favor of Davis in a sufficient amount to pay for the minerals purchased.

On cross-examination, Cain further testified that this transaction happened fourteen years prior to the time of his testimony and that all the details of the trade were not clear. That the only interest witness had in the transaction was as an accommodation as a banker. That Gilbreath wrote Davis a check for $1,155 in payment for the Kennemer mineral deed, and if Kennemer only received

$1,050, then Davis received $105.00 as his commission. That he knew W. C. Stevenson during his lifetime and that his general repuation in the community for honesty, fair dealing and trustworthiness was good.

Claude B. Kennemer, one of petitioners in this cause, called as a witness, testified (R. 110) under direct examination as follows: That he lived in the Coke community in Wood County, Texas, and that he had lived on the 210 acres of land covered by the mineral deed here in question since 1911, and that he had lived in Wood County since 1906. That he married Lottie French in 1905 and continued to live with her as his wife until her death. That a part of the land included in this 210 acres was the homestead of his wife's father. That he and Mrs. Kennemer had three children, two of them still living, and one, a daughter, died in 1938. That the daughter was married at the time of her death and three children and her husband survived her. That all three of the children of his deceased daughter are minors. That one of the children, eleven years old, lived with appellant. That Frances Kennemer, his youngest daughter, is now fifteen, and Matrie is thirty and married. That Frances, fifteen years of age, is in the public schools and had continued to live with him at this home place since she was born and after the death of her mother. That his wife, Lottie French Kennemer, died on the 18th day of August, 1942, as a result of cerebral hemorrhage. That she died within six hours after she was stricken. That he made a crop on this 210

acres of land in 1929. That the only year since he had owned this land that he himself did not make a crop on it was 1924. That he owned no other property at any place, and that this 210 acres constituted his homestead. That he rented some rooms at Como in 1929 in order to put his children in school but was making a crop on this 210 acres and was there every week of the time. That he never had his home at any other place except this 210 acres. That he bought this land a piece at a time and in 1929 he owed some money on a part of this land known as the Hargrove tract. That in 1929 he was buying some cotton at Pittsburg and Daingerfield and when he came home one night he learned that there was a long distance call for him from Coke. That in a short time he called again and it was Mr .Davis. That he told him what he wanted and the witness made arrangements to meet him at Coke's store the following Monday. It was on Saturday that he had the conversation over the phone with Davis. That he got to Coke's store about nine o'clock the following Monday morning and reached an agreement, subject to the approval of his wife, to sell one-half of the royalty on the 210 acres for $5.00 an acre. Mr. Davis told him to talk it over with his wife, and if it was satisfactory with her, to get his deeds with the description of the land in them and bring them down to Winnsboro and meet him at his office. That he and his wife arrived at Winnsboro about 11:45 on that Monday morning and went direct to Mr. Davis' office. That he told Mr. Davis that he had sold some cotton Sat-

urday and was supposed to make delivery on Monday and that Davis would have to be in a hurry about fixing up these deeds. That he had to get his wife back to Como. That they had a year and a half old child there at home, and that the train left Winnsboro for Como, where his wife was going, about 12:30. That he told Davis that his wife had to catch the train and that he had to get to Pittsburg. That he was going east to Pittsburg and his wife was going north to Como.

"Q. What occurred when you told him that?

A. He said to come in and sign up and we would be ready to go.

Q. What occurred then?

A. I went in and signed.

Q. Did he give you some paper to sign?

A. Yes, sir.

Q. Did your wife go with you?

A. Yes, sir.

Q. Where did you sign? Do you remember the exact place you signed?

A. He had some bank fixtures in there and had a bank window there and I signed there at the window.

Q. He had a cage like you see in a bank, bank fixtures in there, and a window in it, and you put it in that window?

A. Yes, that's right.

Q. I don't want to lead the witness, but I don't know how else to ask. Is this the thing you signed?

A. That's my signature.

Q. On the 28th day of October?

A. Yes, sir.

Q. Is that your wife's signature?

A. Yes, sir.

Q. Did she sign on the same window you did or not?

A. She did.

Q. Were you or were you not present when she signed it?

A. I was.

Q. How far away?

A. Right by her side.

Q. At the time you signed the document and at the time your wife signed it, what was on it?

A. It was blank.

Q. Do you remember about whether these words in the first line 'C. B. Kennemer and wife, Lottie Kennemer' were on it?

A. That was possibly there; I really don't think it was, but possibly it was.

Q. What about this description of the land pasted on there, was that there?

A. No, that wasn't there.

Q. All down in there (indicating to instrument) do you remember what, if any thing, was in there?

A. Nothing was down there; I am not so positive about the first.

Q. After you signed there and your wife signed the document, what occurred then?

A. He asked me to leave the deeds so he could finish it up later, and I got the deeds and gave them to him.

Q. Then what happened?

A. He gave me the check for $1,050.

Q. There at the time?

A. Right there.

Q. Then what happened?

A. I walked down to Milo Cain's bank and cashed the check and put the check in the bank, and drawed $50.00 and taken a deposit slip for $1,000 and took $50.00, and went from there to the depot.

Q. To put your wife on the train?

A. To put her on the train.

Q. Then what happened?

A. I got in the car and went to Pittsburg.

Q. Did you see her train leave?

A. Yes, sir.

Q. While you were there?

A. Yes, sir.

Q. Did you see Mr. W. C. Stevenson there at any time you were there?

A. No, sir." (R. 117-119)

That the witness has only a common school education and that outside of farming, the only other thing he had ever done was to buy a little cotton.

"Q. Are you familiar in a general way with when a person takes your acknowledgment to a deed?

A. I think so.

Q. Did any one go through any part of the process of taking your acknowledgment to this mineral deed?

A. No, they didn't." (R. 120)

That there was nothing said between him and Davis as to whether or not Davis was purchasing these minerals for himself or for somebody else. That he did not give a thought as to whether the transaction had with Davis was legal or not. That he did not get his deeds back from Davis for probably eighteen months; that he didn't have an occasion to use them and never asked for

them. That in 1929 he claimed this 210 acres as his homestead and has since 1911. That since 1911 he has claimed no other land as his homestead. That when he had voted, he had always paid his poll tax and voted at Coke, Texas. That he took the necessary steps to and did secure the $3,000 tax exemption on a homestead on the land here in question. That he lives in one of the two sets of improvements situated on this land. That at all times since 1911 he has had at least a part of his furniture in this house, and that when his family lived in Como, to where they had moved to put the children in school, he spent at least one night a week in this house on this 210 acres, and that his daughter, Ethel, whose husband is now dead, stayed there and that they looked after the gathering of the crops. That he only had some housekeeping rooms in Como in 1929. That his daughter, Matrie, was in school at Como and that his youngest daughter, Frances, was a baby and staying with her mother. That Matrie was fourteen or fifteen years old at this time.

"Q. Claude, you got $1,050, I believe you said?

A. That's right.

Q. Are you ready and willing to pay that $1,050 back to Mr. Gilbreath or Mr. Billington or whoever is entitled to it?

A. Yes, sir.

Q. Do you have that much money in the bank?

A. Yes, sir.

Q. What bank?

A. The Cain Bank and the Pittsburg Bank.

Q. You have that much money in two banks?

A. Yes, sir.

Q. Will you pay that to anybody the court tells you to?

A. Yes, sir." (R. 126, 127)

On cross-examination by Mr. Ramey, the witness testified (R. 127) as follows: That he had been married only once, and that his wife died August 18th, 1942, intestate. That he did not own any land in the vicinity of Como nor any interest in any land in that vicinity. That he would have had an interest in the Kennemer estate but his father did not die until 1934. That he owned 210 acres of land in Wood County in 1929, the same land described in the mineral deed, and that was all the land that they owned. That the trade he made with Davis was to sell him half of the interest in the royalty of this 210 acres for $1,050, and, in addition to that, he gave Davis an oil and gas lease on the land for the same consideration. That he never rendered this land for taxes at any time as a non-resident and never held an office in Hopkins County or in any other county. That he had seen notaries take acknowledgments a few times, but when he signed this mineral deed in 1929, he had had several transactions previously and he

supposed that it was the custom to take the acknowledgment and he did not say any thing to Davis about acknowledging the mineral deed. That he supposed the instrument would be good as it was taken and handled by Davis. That he didn't know of any thing about the mineral deed that he was now attacking that was not in the exact trade he made with Davis. That he saw Craddock at the Coke store the morning that he talked to Davis. That Craddock had a typewriter there. That Davis didn't tell him to bring the deeds to the Coke store, but merely told him to be there and he got there about nine o'clock. That he went back to Como, talked to his wife, they agreed to accept Davis' proposition, his wife got ready and they went direct from there to Davis' office. That he looked at the paper that Davis handed him to sign on that Monday but didn't read it through. That there is a possibility that could have been at the top, but he wasn't sure. That he told his lawyer that the paper was as blank as his hand. That he had known all along that there was not any thing on the paper when he signed it except the printed words. That no question arose in his mind as to whether or not he was making a valid deed at the time.

"Q. Was there any question in your mind as to whether or not there was any necessity for the things to be filled out?

A. Necessary for it to be filled out, yes.

Q. And knowing it was necessary, you intended for Mr. Davis to fill them out?

A. He said he would fill them out and finish them later.

Q. He said he would finish them later and you said all right?

A. He said for me to give him the deeds, and I gave him the deeds and automatically I gave my consent to fill them out. When I gave him the deeds and he accepted them, automatically I gave my consent.

Q. To fill in the blank spaces?

A. Yes, sir.

Q. And you expected him to do that?

A. I was sure he would do that.

Q. You intention was that he should do that?

A. That's right, I was sure he would do it." (R. 133) and that later some one filled them out, as he understood they would do.

That after the deed had been executed in October, 1929, the exact date of which he did not remember, but it was while he was preparing to plant some corn the following spring, Mr. Gilbreath came to the field where he was at work and inquired of him concerning the giving of the oil and gas lease on the Kennemer land to Davis. That he told Gilbreath that he had executed the mineral deed and the lease in blank at the same time. That later he had a discussion with Gilbreath and Billington at Quit-

man at the time that Gilbreath and Billington's suit was supposed to come up against Davis on the lease. That Mr. Gilbreath asked him whether that lease was taken in Clarence Davis' name and he told him that it was wholly blank. That that was the time Gilbreath came to the field where he was at work when he told him that. That he was not claiming that the transaction was not any good at that time, because he didn't know that it wasn't good. That he executed Defendants' Exhibit No. 3 (R. 136 to 141) without giving a thought as to whether or not the mineral deed here in question was valid. That at Judge Suiter's request, he went to his office in Winnsboro and that he asked Judge Suiter what that instrument applied to and Judge Suiter stated that its only purpose was to correct the field notes in that royalty deed executed in 1929. (R. 142) That was after they had brought in oil on his land. That they brought in the well to the best of his recollection in June, 1942. That the first time that he claimed that the royalty deed was void was probably July, 1942.

"Q. When you signed it, you recognized this royalty deed you and your wife signed in 1929 was good?

A. I don't know whether it was good or wasn't; the supposition was that it was; I don't know.

The Court: I understand the law about this business, but just answer me this: How can you from a moral standpoint justify this claim after you sold this mineral interest, and it conforms to the terms you agreed to sell

it on and you got your money? How do you justify bringing this law suit?

A. I don't know whether there is any justification or not; it is just a matter of fact." (R. 143)

On re-direct examination, Kennemer further testified that the first time he learned or had any information that the mineral deed that he and his wife executed was not any good was when he heard a discussion in Turner's Store at Winnsboro concerning a mineral deed that had been given by George Kennemer. That at that time Mr. Puckett stated that a deed that had been executed in blank was no good. That after he heard that discussion he mentioned to Puckett that his deed was executed in the same manner as the George Kennemer deed, and Puckett told him that his deed was not valid. That he remembered the occasion of Judge Suiter coming to his house to get his wife to execute the instrument designated as Defendants' Exhibit No. 3. That he was on the back porch. The house faces west and has two rooms runnning north and south, and a front porch as well as a back porch. Running back from the north he had three rooms on what is known as an ell. That he was on the back porch talking to Artemus Robinson when Judge Suiter came. That on October 28th, 1929, when he left Winnsboro around 12.20, he went to Pittsburg and stayed there until around 3:30 or 4:00 o'clock and then went back to Como and arrived there around sundown. That he came back through Winnsboro but didn't see Mr. Stevenson and never had any conver-

sation with him. That his wife was at home when he got there. That he and his wife were together at all times from the time he arrived in the afternoon until he left the next morning around daylight to go back to Daingerfield. That he went through Winnsboro that morning but did not see or have any conversation with Mr. Stevenson. That nothing was said to him about acknowledging any deed and that he left his wife at home that morning.

Mrs. Bernice Robinson, a witness called by petitioners, testified (R. 152) as follows: That she had never testified before, and that she was the wife of Artemus Robinson; and had lived at Coke in Wood County all of her life. That she was familiar with the homestead of Claude and Lottie Kennemer which is about a mile and a half north of Coke's store. That she knew Lottie Kennemer during her lifetime and had known her all of her life. That her father and mother lived there until their death. That she was at the Kennemer home on the 14th day of July, 1942, on the occasion when Judge Suiter came there to see Mrs. Kennemer. That she had come there with her husband who had come to see Claude Kennemer. That when they drove up, Mrs. Kennemer was out raking the yard and she got in the car with her, and the witness's husband went around to the back porch to talk to Mr. Kennemer. Mrs. Kennemer was something like 55 years old at the time of her death. That a short time after Mrs. Kennemer got in the car with the witness Judge Suiter came up.

"Q. Did he make any statement to her or have any conversation with her there?

A. He told her he had some papers he wanted her to sign.

Q. What did she say?

A. She said she had signed all the papers she wanted to sign not knowing what she was signing.

Q. What else was said?

A. He said it was some correction on some field notes.

Q. Judge Suiter said it was a correction of some field notes?

A. Yes, sir.

Q. Did Mrs. Kennemer make any reply?

A. She just told him she was tired of signing papers that she didn't know what she was signing.

Q. What else occurred?

A. She taken those papers; she taken those papers and said she would go in the house with them and see her husband, and see Mr. Kennemer.

Q. Did she come back?

A. She came back.

Q. What did she say to Judge Suiter?

A. She said she would sign those papers, but she didn't want to.

Q. Did she say why she was going to sign them?

A. She said she would sign them, but didn't want to." (R. 154).

That Mrs. Kennemer signed the papers on witness' purse. That when she signed the papers she handed them to Judge Suiter, and she didn't remember that Judge Suiter said any thing else to her. That the witness had had a notary public take her acknowledgment and she knew in a general way what that procedure was and that she didn't remember any thing of that kind being said or done by Judge Suiter. That Judge Siter left the house before she did.

On cross-examination by Mr. Calhoun, the witness further testified (R. 159) that on this particular day she got to the Kennemers before Judge Suiter did. That she knew Judge Suiter quite well, had known him practically all her life. That she had never seen Judge Suiter out there at any other time at the Kennemer's house. That in all the dealings she had ever had with Judge Suiter, he had been very courteous. That after Mrs. Kennemer had signed the instrument, she and Judge Suiter didn't go off any where and talk. That Mrs. Kennemer never left her car. That Mr. Kennemer was around the house somewhere, but she couldn't see him from where she was. That she knew Mr. Puckett and that the only time she

had ever seen Mr. Puckett was the time she saw him with Mrs. Kennemer (R. 160). That Mrs. Kennemer came with Puckett over to the store to talk to her (R. 161).

Plaintiffs rest.

W. D. Suiter, called as a witness by respondents, testified (R. 161) as follows: That he lived in Winnsboro, Texas, and was engaged in the practice of law and had been for 54 years. That he had practiced in that community 35 years. That he had been State Senator and County Judge of Wood County. That he was acquainted with C. B. Kennemer and knew Mrs. Kennemer during her lifetime. That he had known the Kennemers probably thirty or forty years. That, representing C. B. Billington and J. C. Gilbreath, he prepared a royalty deed amendment or ratification instrument for execution by Mr. and Mrs. Kennemer. That he didn't recall whether Claude Gilbreath came by his office or not, but he had a letter from him from Oklahoma.

"Q. Do you have it?

A. No, I don't have.

By Mr. Lattimore: Has that been destroyed?

A. Yes: I don't keep letters of that kind. He wanted to have a correction of the field notes in the original deed that was made to Mr. Billington, as I understand, by Mr. and Mrs. Kennemer; that the oil company had had the land surveyed and that the field notes varied from the

field notes in the deed, and that he would like to have an instrument signed by them.

Q. By whom?

A. By Mr. and Mrs. Kennemer, making the field notes correspond to the field notes in the survey made by the oil company.

Q. Did he furnish you a copy of those corrected field notes?

A. He did.

Q. Did you have before you at the time you prepared the amendment or ratification instrument a copy of the original mineral deed that Kennemer and his wife had executed?

A. I did not.

Q. Or the original thereof?

A. No, I didn't.

Q. Did you prepare the instrument of correction?

A. Yes, I drew an instrument setting out the field notes just as Gilbreath had furnished them to me.

Q. I hand you Defendant's Exhibit No. 3 and ask you to state to the court whether or not that is the instrument you prepared which you have been testifying about.

A. Yes, that's the instrument.

Q. You said you didn't have the original royalty deed or mineral deed of which this is purported to be a correction before you at the time you prepared that?

A. No, sir, I didn't.

Q. Did you understand when you prepared that that the original deed was made to Billington and Gilbreath?

A. That was the impression I had." (R. 163, 164)

That after this instrument had been prepared, he saw Mr. Kennemer at J. F. Turner's store at Winnsboro and told him what he had prepared and asked him to go to his office and read it. He said all right and came to the office and sat down and very carefully read the instrument and he said: "This is all right", and that the witness said: "It is correcting the field notes like the oil company made the survey and it seems they want that kind of change." That Kennemer did remember that he had sold the royalty and so on, but didn't get much for it, but he guessed the deal was all right as far as it was concerned "and he said: 'This instrument doesn't do any thing but correct the field notes as contained in the old mineral deed. The mineral deed isn't changed in any way.' And I said 'That's true'." (R. 164)

That Kennemer then signed the instrument and acknowledged it at witness' office. That he told Kennemer that he would drive out that afternoon and get Mrs. Kennemer to sign it. That Ben Stokes was with him to do the

driving; that witness did not drive the car. That when they drove up to the house, Kennemer came out and spoke and he told him he had come to see his wife about signing the instrument. That he asked him if he had talked to Mrs. Kennemer about it and he said no, but he would go around and see her on the back porch. That he took the instrument with him and brought it back and said to go around and see her, which witness did. That he went around and talked to Mrs. Kennemer and she told him that Claude had explained it to her. That Mrs. Kennemer asked him if the instrument included any other land other than that in the original deed, and he said that there might be a little variation in the description. That he told her: "The way I understand it. I said: 'It provides that the old deed shall remain in full force and effect like it is, and you are protected in this and no other land will be included in this'. She said: 'All right, that she didn't want to sign any instrument that covered any other land than that covered by the old deed. She signed it and I took her acknowledgment." (R. 165, 166) She didn't say that she didn't want to sign it, and her husband was not present at the time he took her acknowledgment. That she acknowledged that she had signed it for the purpose and consideration therein expressed and did not wish to retract it. That his recollection was that Mr. and Mrs. Robinson drove up about the time that he walked around to the back where Mrs. Kennemer was, that his recollection was that at the time they drove up

Mr.and Mrs. Kennemer had already signed the deed, and that he took Mrs. Kennemer's acknowledgment on the back porch.

"Q. On the back porch of the Kennemer house?

A. I want to say this, that after hearing Mrs. Robinson, I am not absolutely certain about this, but my recollection is that I was out there on another occasion when Mr. and Mrs. Kennemer signed an affidavit as to limitation on some other lands and I rather think that Mrs. Kennemer was in the car with Mrs. Robinson at the time, but that was not at the time she signed the instrument at all". (R. 167)

That he had a conversation with Mr. Craddock in the presence of Mr. Calhoun the latter part of August in Winnsboro. That he didn't discuss this matter with Mr. Craddock but Mr. Calhoun did, and that Mr. Calhoun wrote down what Craddock told him. That his recollection was that Craddock stated that he prepared all those instruments and didn't have any recollection of having prepared this instrument, but supposed he did, because of having prepared all of them, and stated, the witness understood, this isn't the exact language, in substance, "that he wasn't present when Mr. and Mrs. Kennemer came down there, and didn't know anything particularly about the execution of that instrument". (R. 168)

That he didn't remember when the field notes were put in. That his recollection was that Craddock stated

that he didn't remember any thing about the particulars of how or when it was done or any thing about it. That at that time he didn't have it in his mind. That either that afternoon or the next day he was in the office with C. D. Davis and Craddock and discussed the matter, and that Davis stated in substance that he didn't understand why Kennemer had brought this suit; that this was an absolutely fair and square deal and Kennemer got the money for the royalty, and the deed was made to him and he assigned it to Billington, and that in so far as he knew, there was no irregularity about it in any way. That he knew W. C. Stevenson in his lifetime and had known him for forty years, was acquainted with his general reputation for truth and veracity and his reputation for honesty and trustworthiness, and that it was good. That he knew Mr. Stevenson's handwriting, and that the signature signed to the notary's certificate of Plaintiffs' Exhibit 1 is that of W. C. Stevenson. That the endorsement on the back of the deed "C. B. Kennemer and wife, Lottie Kennemer, to C. D. Davis" is also the handwriting of W. C. Stevenson.

Cross-examined by Mr. Lattimore (R. 179), Senator Suiter further testified: That the name signed to the notary's certificate of Plaintiffs' Exhibit No. 3 (R. 170-178) is the signature of W. C. Stevenson, and that the endorsement on the back of "C. B. Kennemer and wife to C. D. Davis" is also Mr. Stevenson's handwriting. That he told Claude Kennemer that the instrument he prepared

for him to sign constituted no change in the original mineral deed except the field notes. That Kennemer stated that he didn't get enough for the land, but if this instrument didn't do any thing execpt change the field notes, he would sign it.

"Q. When you wrote this instrument and when you presented it to Claude Kennemer, you had no thought or intention except to amend the lease so the new field notes would be in it?

A. Amend the deed and leave it like it was except to correct the field notes.

Q. You had no thought except to insert these new field notes and change the old field notes to make the new field notes apply to it?

A. That's right.

Q. You told Mr. Kennemer's wife the same thing when you went to her?

A. Yes." (R. 180)

That in so far as he knew, no question had been raised about the validity of the original mineral deed. That no one within his knowledge paid Mr. and Mrs. Kennemer anything for the execution of Defendants' Exhibit No. 3

Having been re-called by the court, C. B. Kennemer testified that Davis never paid any rentals on the oil and gas lease that was taken by him.

Mrs. Alice Niblack, a witness called by the appellees, testified (R. 183) as follows: That she lives in Tyler, Texas, and is employed by the law firm of Ramey, Calhoun, Marsh, Brelsford & Sheehy, and had been for ten years. That on August 29, 1942, C. D. Davis came into their office in Tyler and had a conversation with Mr. Calhoun and Mr. Ramey which she took down in shorthand as it was dictated to her by Mr. Ramey or Mr. Calhoun.

"Q. State whether or not they were facts Mr. Davis stated with reference to the tarnsaction.

A. After a discussion between Mr. Davis and you or Mr. Calhoun and Mr. Davis, you would dictate to me a few sentences of what you had discussed with him and then you would talk some more." (R. 184)

That she transcribed the notes she had taken on that same afternoon. That on that occasion Davis stated that it was his recollection that he paid the Kennemers $1,050 for a half of the royalty and an oil and gas lease on the 210 acres. That he made the deal with Kennemer at Robinson's store in Coke, and made arrangements for Kennemer and his wife to come to the office and sign, and that he was not present when they acknowledged it. That he didn't see either of them sign the deed. That he left the check for the consideration to be paid Mr. Kennemer with Mr. Wortham Craddock. That he stated that W. C. Stevenson appeared to be the notary who executed the acknowledgment on that deed and at that time Stevenson was a

notary public and that he was employed by Davis in the insurance business. That he further stated that it was his recollection that he was in Winnsboro at the time Kennemer and his wife came in to sign and acknowledge the mineral deed, and that he had no recollection of ever discussing the matter with Mrs. Kennemer.

On cross-examination the witness further testified:

"Q. Do you remember him saying at the time the mineral deed was prepared that the name was left blank?

A. Yes." (R. 187)

On re-direct examination the witness testified:

"Q. Counsel asked you whether or not Mr. Davis said any thing about the grantee in the mineral deed being made blank. Did you mean the mineral deed or the assignment of the mineral deed?

A. The thing to Mr. Billington.

Q. The thing to Billington, what do you mean?

A. He said he prepared the instruments in blank and took them to Milo Cain's office and, as I recall, he said he left every one of those grantees blank in there so that Cain or somebody down there could fill them in.

Q. In the instruments that were made to Billington?

A. Yes.

Q. Read the last paragraph and refresh your memory.

A. Yes, sir.

Q. What is your recollection about it as to whether or not the grantee in the Kennemer deed was left blank?

A. I had the instruments mixed up, Mr. Ramey. I am talking about the assignments from Davis to Billington or to blank, he didn't know who got them.

Q. Did he say any thing with reference to the name of the grantee in the deed Kennemer signed being blank?

A. No, I don't remember it." (R. 187, 188)

On re-cross-examination the witness further testified: That she didn't know that he said any thing about the description in the mineral deed, and that she didn't remember if he were asked about whether the name of the grantee was in the original mineral deed.

J. C. Gilbreath, a witness called by the appellees, testified (R. 189) as follows: That he was born in Wood County about six or seven miles south of Winnsboro, but had lived in Shawnee, Oklahoma, since 1916. That he went to work in the oil fields in 1912 in Louisiana and worked at that until 1919. That in 1919 he married C. B. Billington's daughter and became associated with him in the lumber business. That he operated a lumber yard at Maud until 1929, at which time he went to Shawnee and continued his association with Mr. Billington. That from outward appearances he figured there was oil in the Coke community.

"Q. Did you interest your father-in-law in putting in some money with you and buying some mineral interests there?

A. I did, sir.

Q. Then what did you do toward carrying out that proposition?

A. Well, some time in October, 1929, I came down to Winnsboro and made a deal with C. D. Davis to go out and acquire some royalty interests there for us." (R. 191)

That Davis told him he could buy the minerals for him on the basis of $10.00 per royalty acre; that that was a little high, but he called Mr. Billington to see if it was agreeable and after Mr. Billington agreed, they agreed to pay $10.00 per royalty acre. That after this conversation he told Mr. Davis to buy the stuff at $10.00 per royalty acre, and that he and Mr. Billington would pay Davis $1.00 per royalty acre as brokerage commission. That during the interval within which Davis was purchasing these royalties for him, he stayed around Winnsboro part of the time and a part of the time at his brother's house at Alba, and Mr. Billington was in Oklahoma and didn't come down at any time during these transactions.

That he carried an account in the Cain Banking Company but it was not of sufficient amount to cover these transactions, and that he gave Mr. Cain an additional deposit and drew on Mr. Billington for his part. That

Davis went out and wrote his check and he issued his check to Davis in lieu of the one he had issued. That four or five days were consumed during all of this process of negotiation. That it would not be much longer or much shorter than that. That he and Mr. Billington were fifty-fifty on these transactions. That he picked the instruments up at the Cain Banking Company and checked them and that there was a separate check issued for each purchase. That with the exception of the mineral deed from the Kennemers, all the deeds were made to C. B. Billington.

"Q. State whether you gave any instructions with reference to having the instruments made to Mr. Billington?

A. They were supposed to be made to Mr. Billington in the beginning. I was drawing a draft on Mr. Billington for his part and felt the deeds should go to him instead of myself, and then I could in turn take a deed from him, and which I did." (R. 194)

That he checked the instruments at the bank as to whether or not they were filled out and when he saw them, they were. That there was nothing said about any of the deeds not being filled out when he received them. That he took the deeds to the County Clerk at Quitman himself to have them recorded. That he came back to Winnsboro and found out that there had been some oil and gas leases taken in connection with the mineral deeds with his money. That he tried to contact Mr. Davis but couldn't, and then he contacted the men with whom Davis had dealt. That he

went to Mr. Kennemer's farm and had a discussion with him about it, and Mr. Kennemer said that he had executed an oil and gas lease and a mineral deed for a half interest in the minerals. That Kennemer said that he contacted Davis at the Coke store and made a deal there that afternoon, and said he would have to go get his field notes and it would be a day or two before he would be in Winnsboro and he would bring his field notes and complete the instruments there. He said that the deed was prepared for his wife to sign at Como. He said he had his wife to go to Winnsboro and they went to Davis' office to sign the instrument and made the acknowledgment. That neither Mr. Craddock nor Mr. Davis was there and that there was a Mr. Stevenson in there and he and his wife went before Stevenson and signed the instruments. That Stevenson acknowledged the instruments in Winnsboro and he received the check from Stevenson. (R. 196) That Kennemer said both the oil and gas lease and the mineral deed were completed; that he used the word "completed". That after he had found out that Davis had taken an oil and gas lease as well as the mineral deed, he brought suit against Davis in the District Court of Wood County, and arranged with Mr. Kennemer to testify, and when the case was set for trial some time in September, 1930, Mr. Kennemer came to Winnsboro for the purpose of testifying and talked to him and Mr. Billington. That on that occasion Kennemer told him that he requested that the mineral conveyance be given in the name of Davis be-

cause he was acquainted with Davis and didn't know Mr. Billington. That at no time during the conversations with Mr. Kennemer did he ever tell the witness that the deeds were in blank when he signed them, nor that he and his wife didn't acknowledge them. That Kennemer stated that the instruments were originally prepared for his wife to sign at Como, but they changed their minds and both came to Winnsboro. That he did not discuss the terms of the lease with Kennemer. That he never discussed the matter with Mrs. Kennemer and within his knowledge, had never seen her. That the first time he heard that Kennemer was questioning the deed was in August of 1942 when a Mr. Puckett came to see him and tried to get him to file a suit against the Amerada.

On cross-examination, Gilbreath further testified (R. 201); That he had seen Puckett twice previously. That he knew Puckett there as a field man. That Puckett and Mr. Rob Griffin were together when they came to Shawnee to see them about bringing the suit against the Amerada. That he and Mr. Billington had made a contract with Mr. Rob Griffin to represent them in the George Kennemer matter. That they made an agreement with Rob Griffin and that they didn't know that Griffin was associated with Puckett. That he went to see Kennemer after October, 1929, to see about the lease; that he went to see what Kennemer had done with Davis in regard to giving him the lease. That Kennemer told him the circumstances leading to the purchase and consummation

and that's all there was to it, and again at Quitman they had a conversation about this thing. That what he went to see Kennemer about was as to whether or not Davis had used his money to buy the lease, and Kennemer told him that he sold the oil and gas with the mineral deed all in one deal. That Kennemer was in the pasture preparing a fence at the time he talked to him about this matter. That he never talked to Craddock about these transactions and didn't know that Craddock was Davis' partner until the transactions were finished. That he didn't tell Davis to take these mineral deeds in blank. That when he got the mineral deeds from the bank all of them had the name of C. B. Billington as grantee except the Kennemer deed, and there was a transfer from Davis covering that one.

"Q. As a matter of fact, you told Davis in Cain's presence that you wanted these mineral deeds left in blank?

A. I don't think so, sir.

Q. Had you known Mr. Cain before?

A. He is a first cousin of mine." (R. 207)

That he made an effort prior to the time that he employed Davis to purchase some royalty interests in that community, but he was unable to get any, but he was offering $3.00 an acre. That he drew a line on a survey map and told them not to go outside of the line, but buy inside it. That he took Coke for a center and told

them to buy a mile and half either way. That Milo Cain did not make the illustration that he testified about as to what was to be paid for the royalty interests.

After Gilbreath was excused, the following proceedings were had:

By the Court: It isn't necessary for you to offer any more testimony.

By Mr. Ramey: It is corroborative.

By the Court: I was convinced before this man testified that this man Davis, with the experience he had had in this land business and personally interested in the transaction, all his contradictory statements and everything about this matter, and his failure to recollect certain matters tells me just as a matter of common sense that these instruments were fully filled out before he had these people execute them, and that they were duly acknowledged, and that they were complete at the time they were acknowledged, and that's the way I am going to find. There's nothing Milo Cain can say about this; he doesn't know anything about these facts. He might contradict this man about the details of that trade, but that doesn't have any bearing on the determination of this thing, because I am convinced that these transactions were fully consummated and those mineral deeds and the lease were filled out at the time Kennemer and his wife executed them, and that is an attempt to legalize stealing; that's what it is in my judgment, and trying to take ad-

vantage of a technicality to back up on a trade honestly made. I have no sympathy with that. They are just exercising their imagination and not recollection about what occurred. I am going to find that these were filled out at the time Kennemer and his wife executed them, and that they were duly acknowledged. I know what has been said. I have listened to it, and there's nothing you or anybody else can say, because I think that's the way it points, every fact and circumstance. That's my finding.

By Mr. Lattimore: I would like to be heard.

By the Court: All right.

By Mr. Lattimore: I have only this, that from one or two questions asked by the Court it indicated the testimony had not been clearly put to him, and if this matter is presented to the Court there is, as I view it, a duty under the law, and the Court should and I think will to the best of his ability, whatever may be your feelings—(Interrupted).

By the Court: I have listened to every word of it. If you have any argument about your interpretation, go ahead and I will listen to it.

By Mr. Lattimore: I do have. As I view it, there is no dispute, there can't be any dispute about the fact that that instrument was not signed or was not acknowledged before Stevenson. Let's assume that the contradictions of Mr. Davis make his testimony seriously subject to ques-

tion. If he made the statements he is charged with making in Mr. Ramey's office—(interrupted)

By the Court: I believe he said every word repeated there.

By Mr. Lattimore: If he made that statement, it is sufficent to say that clouds his testimony. Here is Craddock (interrupted)

By the Court: Craddock didn't say anything that affects the issue one way or the other.

By Mr. Lattimore: Craddock got the mineral deed in the late afternoon; it didn't have the description on it and it didn't have the acknowledgment certificate on it. Kennemer is here. This record is wholly clear of any suspicion that there is anything dishonest.

By the Court: It is clear with his interest in it and the long period of time that had elapsed since this occurred, and the contradictory statements about it which I believe he made to this other party. His testimony should be taken at face value. He is not interested in the outcome.

By Mr. Lattimore: He is just the same as Mr. Gilbreath, no more or no less. They both stand on a parity in this Court.

By the Court: They don't stand on a parity here, because Mr. Gilbreath so far as this record is concerned has lived up to everything he agreed to do. Kennemer is trying to repudiate everything that has been done.

By Mr. Lattimore: Is Kennemer not to be respected? He came in and said he did make that deal, and told all the circumstances of the thing, and says: "The law is here and I want to take advantage of it." Is there any thing dishonorable about that?

By the Court: Not legally, no, but morally.

By Mr. Lattimore: Kennemer makes a plain statement of what occurred. It is corroborated by the statement that Mr. Craddock made.

By the Court: Mr. Craddock said he didn't know anything about the execution of this instrument or its acknowledgment.

By Mr. Lattimore: That's right; but he does know that long after Kennemer has gone and his wife has gone it wasn't acknowledged.

By the Court: And here is the most significant part of Craddock's testimony. He claims he filled that instrument out at his office at night, the day they had the conversation with Kennemer at the store on Saturday. He completed the field notes and admitted that Kennemer's acknowledgment was not taken until Monday, and according to Craddock's testimony the instrument was completed with the field notes and evertyhing.

By Mr. Lattimore: I wish I could get the Court to listen to this—you have the record wrong.

By the Court: Here's what Craddock said, Craddock said it was on Monday.

By Mr. Lattimore: Right.

By the Court: Your witness Davis said he originally talked to him on Saturday.

By Mr. Lattimore: No.

By the Court: He did say that.

By Mr. Lattimore: He always said it was Monday.

By the Court: Your great witness Davis on Cross Examination said he talked to Kennemer on Friday night and met him at the store on Saturday when this conversation was had, and Craddock said he filled out the field notes that night when he came in from the field.

By Mr. Lattimore: You are wrong about that.

By the Court: How much time do you desire for your argument?

By Mr. Lattimore: I'm not going to take a minute if you are not going to listen.

By the Court: I am going to listen. Just want to know how much time you want. I just want information.

By Mr. Lattimore: I should think ten minutes will be plenty.

By the Court: We'll recess fifteen minutes before we start.

(Recess)

By Mr. Lattimore: I am sure your Honor would not respect me if I didn't speak frankly, and I hope not too boldly as to give any misconception of anything because the affection I have for this Court would rob my heart of any thought of contempt. The record in this case, as I firmly believe, leaves no room for any finding that this instrument was filled out before Mrs. Kennemer signed it and was acknowledged by her at any time. All the physical facts are against it. All the physical facts are against it, aside from one single circumstance, and that is that an interested witness says: "He told me he signed it and acknowledged it regularly". Here is the deed that has had three different typewriters working on it. The witnesses are in considerable difference about one matter and that is as to when Kennemer saw Davis and as to what Davis' movements were from that time on to the time this paper was signed. My experience has been that those inconsistencies are speaking guarantees of the efforts of the witnesses to tell the truth. If Davis, Craddock and Kennemer wanted to perpetrate a falsehood on this Court, they would be less than children not to be able to agree on movements of that sort. If I had been able to caution Mr. Davis and had been willing to do so, I believe anybody would know that any lawyer could do that so that those inconsistences would not appear. Whether Davis talked to Kennemer on Saturday or whether Davis talked to Kennemer on Monday can not, as I view

it, be any indication of truth or falsity about how the deed was signed. The facts remained that everybody said it was signed on Monday at noon. Kennemer was leaving town going to Pittsburg, and his wife had to hurry to get a train which left there going west. Kennemer was going east. The field notes are typed on a different typewriter. Everybody admits that those field notes were gotten off the deeds Kennemer furnished when he walked in the office at Winnsboro. How in the world could it be, how in the world could it be, with the most violent feeling any man could have, that this man ought not to take advantage of his legal rights, even if he could? How can anybody get away from the fact that those field notes were not in that deed when Kennemer signed it? There were a lot of deeds. They had to be put together, five or six deeds had to be assembled in order to compose those field notes. Kennemer had acquired this property over the years. Kennemer walked to the bank and cashed his check and got to the train in time to put his wife on it. Whatever this Court may have in his mind with regard to the willingness of Kennemer to falsify is an untrue conclusion from these facts. Nobody dare to say any thing against him. He has lived out there, farmed out there, and started from a forty acre tract. He is a cotton buyer, and has lived there all these years. There isn't anything in this record from which a man could conclude that he is dishonest or that he would lie unless it be that a Court can say any man who insists on his legal rights ipso facto is dishonest.

By the Court: I don't say he lied, but I do say this power of suggestion has stimulated his imagination or recollection about this thing.

By Mr. Lattimore: Lottie Kennemer is dead, but the record in this case shows before her death she was consulting witnesses with reference to this law suit.

By the Court: Where do you get that testimony from the record?

By Mr. Lattimore: Mrs. Robinson testified to it.

By the Court: I don't interpret it that way.

By Mr. Lattimore: She said that on the day of her death Mrs. Kennemer came to Coke's store with Mr. Puckett and related to her the transactions and asked if that was her recollection of it. It would be improper and I have not attempted to say what Mrs. Kennemer told me. It is sufficient to say that Lottie Kennemer if she had lived would have been here to say the same thing her husband is saying. At least we know she was interested in this law suit. Now, with the deed showing it was written in time and places different and different and on typewriters different and different and different, where is there any room for the conclusion that it was all in A-1 shape there at noon?

By the Court: Do you think that as a matter of common sense that this man who was personally interested would have paid out $1,050.00 on a transaction if it wasn't in proper shape?

By Mr. Lattimore: Judge, he paid out $12,000.00 on deeds that in every one of those homestead deeds it was invalid; every one was in blank.

By the Court: You don't have anything in the record on that.

By Mr. Lattimore: Yes, it's in the record. Milo Cain, the President of the bank, do you think he would come in and lie to this Court when he said all of them were blank when they brought them in and they were blank when he turned them over to Mr. Gilbreath?

By the Court: He didn't say that. He said Davis' name was in this particular deed and that was the reason he sent it back.

By Mr. Lattimore: It was in this mineral deed, but it wasn't in the transfer from Davis to Billington. That also was blank. Every instrument which now is of record putting the title into Billington was at the time it was turned over to Milo Cain and at the time he delivered them to Gilbreath blank. Every one was wrong. Here is what happened there; those people got in the habit of doing things that way, and nobody thought anything about it, and they were careless about those things. In my mind, I am convinced that Mr. Stevenson put that C. D. Davis in that instrument. When he went to acknowledge it, it didn't have Davis' name there, and he put it in there and wrote it on the back.

By the Court: There is the most significant piece of testimony. There is the testimony that Kennemer wanted Davis' name put in as the grantee, because he was the only one he was dealing with, and the only one he knew, and it all squares up to the fact that that instrument was completed when Kennemer and his wife executed it, and acknowledged it. The thing you don't mention, but the most powerful circumstance in the case is that from everything I know about the reputation of this man Stevenson, whom I don't know except from this record, tells me he was a truthful man and a man of fair and honest dealings, and his certificate stands that he took that acknowledgment. That's something we can't get away from. I know in common sense he would not have put that there and testified to that if he did not do it.

By Mr. Lattimore: Stevenson knew that Kennemer had signed it. His partner told him.

By the Court: He was not testifying to the signing; he was testifying to the acknowledgment and the form required by law.

By Mr. Lattimore: That's what he certified to. He is dead and there is no way to get at that circumstance. If that were the law or the rule that should guide the Court, no certificate of acknowledgment could be attacked unless the notary admitted it. That's not the law. If it could not be attacked unless the notary admitted it, that

would be the end of it. It would emasculate the law of the acknowledgment. The fact it stands there is a circumstance and is not to be overcome by strong evidence, and that's the law.

By the Court: It has to be overcome by more convincing evidence than has been offered in this case, because all the facts and circumstances give validity to it in my mind from every consideration, and Mr. Kennemer is no fool. A man of practical business experience who is handling lands and dealing in lands knows what an acknowledgment means from personal experience, and he knew if there was any defect in the acknowledgment or failure to acknowledge that instrument wasn't any good.

By Mr. Lattimore: How would he know that? There isn't any evidence on that.

By the Court: He did know it.

By Mr. Lattimore: There is no evidence in the record that he knew it, nor can there be.

By the Court: His testimony is explicit that he understood in any conveyance of land or an interest in land that it had to be acknowledged before a notary, and he said this was not and he said he knew this transaction was no good. The thing about it, he didn't question it and didn't make any statement contradictory to the record until some enterprising individual went and with his power of suggestion tried to stimulate a recollection that was born of suggestion and suggestion alone. For thir-

teen years this transaction had stood, and he said nothing about it until the advantageous discovery of oil. The testimony just points all one way so far as my appraisal is concerned.

By Mr. Lattimore: The testimony is, as I view it, undisputed that Kennemer while he knew that acknowledgment was required did not at all know that the circumstances under which this instrument was executed, that is, the leaving of it with Davis with instructions to Davis, and Davis saying that he will finish it later, he did not know that was contrary to the law. He tells the Court honestly, and he is condemned for it. He said he didn't know there was anything wrong with it. He tells you that he thought all through the years it was good, and he knew it had to have an acknowledgment, but he didn't know that by filling it out under these circumstances it wasn't good. Puckett was there talking about these circumstances under which titles were had and Kennemer heard it. That's the first he knew anything about it.

By the Court: Why didn't Craddock take his acknowledgment when he was out there, if that's all that's necessary to be done? What was the meaning of going home and getting his wife and bringing her there except for the purpose of completing that transaction?

By Mr. Lattimore: It seems the injustice which the Court is doing my client—(interrupted)

By the Court: I'm doing your client justice and not injustice.

By Mr. Lattimore: I know the Court believes that. I am certain of that. Part of this land was his wife's separate property. He couldn't sign that instrument at Coke's store; he has to go back to his wife and ask her if she is willing. He testified to it; all three of the witnesses testified that he said: "I will go and see if my wife is willing." He went back to get his wife. That trip was made to get his wife and he brought her with him and all the deeds down to Winnsboro.

By the Court: And he brought her with him for the purpose of acknowledging that conveyance.

By Mr. Lattimore: Signing and acknowledging it is what he brought her for.

By the Court: And they waited from Saturday, according to Davis' testimony, to get this instrument in shape for them and have it ready for them to acknowledge when they got down there, and they wouldn't let them acknowledge it until they did have it in shape for them to acknowledge.

By Mr. Lattimore: Let me show you how unreasonable that is. Kennemer had the deeds that had the description in them, and they couldn't get the description until he got there with the deeds.

By the Court: It's strange those deeds did not appear before Monday when your witness Craddock says after

this conversation on Saturday he went to the office that night and wrote the description that night.

By Mr. Lattimore: All I can say to the court—(interrupted)

By the Court: All you can say is you want me to believe every bit of testimony favorable to you and none that is unfavorable.

By Mr. Lattimore: I wouldn't say that. Of course, I would be glad for the Court to do that. I want to see if there isn't some way to show the Court—(interrupting)

By the Court: There's no way you can convince me that I have misunderstood, misinterpreted or failed to appraise this testimony in this case properly. I have listened to it as carefully as I know how and every word that has been said, and I am convinced beyond question of a doubt that this instrument was fully prepared and completed at the time it was executed and acknowledged by Kennemer and his wife, and that's the way I am going to find. You will have your exceptions to that.

By Mr. Lattimore: I should like to bring in the testimony of Mr. Artemus Robinson and Mr. Milo Cain.

By the Court: Who is Mr. Robinson?

By Mr. Lattimore: Mr. Artemus Robinson.

By the Court: Has he been here as a witness?

By Mr. Lattimore: He is here now. As soon as Senator Suiter testified about Mrs. Robinson being there when some other instrument was signed, we called him.

By the Court: I thought the testimony was closed with the possible exception of Mr. Cain. As I understand Mr. Cains' testimony, he has testified already that this mineral deed had the name of the grantee as C. D. Davis at the time it was delivered to him at the bank. Is that correct?

By Mr. Lattimore: Correct.

By the Court: What else do you want from him?

By Mr. Lattimore: He will testify that the instructions given to Davis were to get all these in blank, all these mineral deeds in blank. He will testify that when the deeds were delivered over to him they were in blank.

By the Court: What's the use of bothering with the others? We are not concerned with those. This is the only one we are trying.

By Mr. Lattimore: That's all.

By the Court: Didn't he say the name of Davis was in this deed and Davis transferred it to Billington?

By Mr. Lattimore: He did.

By the Court: What difference does it make about the others?

By Mr. Lattimore: I think it makes a lot. The Court is taking Gilbreath's evidence as true as to what Kennemer said in the pasture. Mr. Gilbreath says that all those deeds when Cain gave them to him had the name of Billington in them.

By the Court: The one here is the only one involved.

By Mr. Lattimore: And we should like to put the testimony of Mr. Cain in the record in those particulars and also the testimony of Mr. Robinson, the husband of Mrs. Bernice Robinson.

By the Court: If Mr. Robinson is present call him as a witness.

By Mr. Lattimore: Just as soon as Senator Suiter testified about the fact that Mrs. Robinson wasn't there, we phoned Mr. Artemus Robinson who lives at Quitman, and he said he would start immediately to come over.

By the Court: Judge Suiter said Mrs. Robinson was there, but as he recalled it, it was when they were signing an affidavit of limitation. I will give you an opportunity to offer that if you want it in the record.

By Mr. Lattimore: I would like to have it in the record.

By Mr. Ramey: While we are waiting, there is one significant fact about this deed. The deed is in evidence, but it wouldn't appear from a printed transcript and I would like the record to reflect the color of the ink, the variation of the color of the ink, from C. B. Kennemer's

signature and Lottie Kennemer's signature and the fact that the same color of ink, to-wit, blue, in Lottie Kennemer's signature is identical with the color of the ink of W. C. Stevenson's signature. W. C. Stevenson being the Notary Public that took the acknowledgment, whereas C. B. Kennemer's is different, and also that the same color of ink was used in the indorsement of W. C. Stevenson, indicating that Mrs. Kennemer signed it before W. C. Stevenson with the same ink.

By the Court: I am convinced about this testimony more than any testimony I've heard in my life.

By Mr. Ramey: I wanted the record to show that.

By the Court: I will let it be sent up as an original exhibit if you want to.

By. Mr. Lattimore: Mr. Robinson is here now.

By the Court: All right, call him around.

Artemus Robinson, having been called as a witness by petitioners, testified (R. 228) as follows: That he was the husband of Mrs. Bernice Robinson, and lived a mile south of Coke's store. That last July he accompanied his wife to the Kennemer home at the time that Senator Suiter came there with some papers. That he had to go there to see Mr. Kennemer on some business. That he drove the car up to something like ten steps from the house, left it in the shade of a tree, and he and Mr. Kennemer went on to the back porch. That he saw Senator

Suiter and Mr. Stokes when they drove up. That he believed that Ben Stokes came around to the porch where he and Kennemer were. He could see Senator Suiter out in front talking to Mrs. Kennemer. That Mrs Kennemer came into the house with the papers and then went back to the car. That Mrs. Kennemer came back where Claude and the witness were and remarked that she had signed all the darned papers she was going to without knowing what she was signing. That the witness remembered that well. That Senator Suiter and Stokes left the Kennemer house before the witness and his wife.

BRIEF OF THE ARGUMENT UNDER ALL PROPOSITIONS AND GERMANE TO ALL SPECIFICATIONS OF ERROR

Rule 46 of the Rules of Civil Procedure provides:

> "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary, it is sufficient that a party at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him" *Moore's Federal Practice*, Vol . 2, page 3089.

After respondent, J. C. Gilbreath, had testified and his testimony, as all other testimony offered by the petitioners, tended only to impeach the witness for peti-

tioners, the trial court stated: "It isn't necessary for you to offer any more testimony, Mr. Ramey"; and, before either side had closed the case, proceeded to state what his findings of fact would be. Whereupon Mr. Lattimore, of counsel for petitioners, insisted on being heard, that he might let his position be known to the court. At great length he explained why a verdict and judgment should be entered for petitioners, quoting the testimony and the law as above set out and as appears on pages 212-226 of the record. There could have been no question in the trial court's mind, or in the minds of this Honorable Court, but that petitioners position was that the testimony was overwhelmingly in favor of petitioners and that the only testimony offered by respondents was testimony that might tend to, although petitioners contend that it did not, impeach the testimony of the witnesses offered by petitioners. While the record does not contain a formal exception to the action of the court, nor a specific request that the court find for petitioners, we contend that under Rule 46 petitioners made known their position to the trial court so clearly that there could be no mistake but that they were contending for a verdict at the close of the case. We are supported in this, we think, by the unanimous opinions of the various courts in dealing with Rule 46.

In *Bucy vs. Nevada Construction Co.*, 125 F. (2d) 213, the court said:

> "As pointed out in the discussion of Rule 46, the function of an exception was to bring pointedly to the

attention of the trial judge the importance of the ruling from the standpoint of the lawyers, and to give the trial judge an opportunity to make further reflection regarding his ruling. *Proceedings of the Institute*, Washington, D. C., 1938 page 87. In justifying the rule, it was stated: 'The exception is no longer necessary, if you have made your point clear to the court below. *Proceedings of the Institute*, Cleveland, 1938, page 312. But, of course, it is necessary that a man would not spring a trap on the court, so the rule requires him to disclose the grounds of his objection fully to the court'. *Proceedings of the Institute*, Washington, D. C., 1938, page 124; see also page 87."

In *Victory vs. Marming*, 128 F. (2d) 415, the court said:

"The general policy of the Rules requires that an adjudication on the merits, rather than technicalities and form, shall determine the rights of the litigants."

In *Sweeney vs. United Feature Syndicate*, 129 F. (2d) 904, the appellant had contended that he made proper exceptions, but the record did not reflect them, and he made a motion in the appellate court to require the trial court to send up a correction of the record so that it could show that he had taken his exceptions to certain rulings of the court being urged by him. Answering this, the court held:

"It is unnecessary to pass upon the motion to amend the record since we may consider the refusal to charge as requested in these circumstances, even though no formal objection appears in the record. Cf. National

> Fire Ins. Co. vs. School Dist. No. 68, 10 Cir., 115 F. (2d) 232, 234. The purpose of exceptions is to inform the trial judge of possible errors so that he may have an opportunity to reconsider his rulings and, if necessary, correct them. See Rule 46, F. R. C. P.; 3 *Moore's Federal Practice*, page 3090. Here it appears that there was full discussion of the point raised which adequately informed the court as to what the plaintiff contended was the law, and the entry of a formal exception after that would have been a mere technicality."

In *Evansville Container Corp vs. McDonald*, 132 F (2d) 80, the Circuit Court of Appeals for the Sixth Circuit held, construing Rule 46, that an objection to a charge of the court on the grounds that there was no substantial evidence to support it relieved the proponents of the objection of the duty of making and availing themselves of the exceptions formerly required. The Court said:

> "Rule 45, Federal Rules of Civil Procedure, 28 U. S. C. A., following Section 723 C, eliminates the formality of the former practice, namely, the exception, and provides that it is sufficient if the party makes known to the court the action he desires the court to take or his objection to the action taken and his grounds therefor at the time the ruling or order of the court is made or sought."

The courts have even gone so far as to hold, *Girard Trust Co. vs. Amsterdam*, 128 F. (2d) 376, that the appellate court could make proper disposition of the issues involved even if there were no special findings of fact

and no objection to such actions on the part of the trial court.

BRIEF OF THE ARGUMENT UNDER PROPOSITIONS 1, 2, 3, 4, 5 AND 6, GERMANE TO SPECIFICATIONS OF ERROR NOS. 1 TO 12, INCLUSIVE

The statute of frauds of the State of Texas, being Article 3995 of Vernon's Texas Statutes, Annotated, provides:

> "No action shall be brought in any court in any of the following cases, unless the promise or agreement on which such action shall be brought, or some memorandum thereof, shall be in writing and signed by the party to be charged therewith or by some person by him thereunto lawfully authorized: * * *
>
> 4. Upon any contract for the sale of real estate or the lease thereof for a longer term than one year; or
>
> 5. Upon any agreement which is not to be performed within the space of one year from making thereof."

Article 1288 of Vernon's Annotated Texas Statutes provides:

> "No estate of inheritance or freehold, or for a term of more than one year, in lands and tenements, shall be conveyed from one to another, unless the conveyance be declared by an instrument in writing, subscribed and delivered by the party disposing of the same, or by his agent thereunto authorizing in writing."

Article 1300 of Vernon's Annotated Texas Civil Statutes provides:

> "The homestead of the family shall not be sold and conveyed by the owner, if a married man, without the consent of the wife. Such consent shall be evidenced by the wife joining in the conveyance and signing her name thereto and by her separate acknowledgment thereof taken and certified to before the proper officer and in the mode pointed out in Articles 6605 and 6608 (Id.)".

Article 6605 of such statute provides:

> "No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she had had the same shown to her and *then* and *there* fully explained by the officer taking the acknowledgment on an examination privily and apart from her husband; nor shall he certify to the same unless she thereupon acknowledged to *such officer* that the same is her act and deed, that she willingly signed the same, and that she wishes not to retract it." (Italics supplied)

It is so well settled in Texas that the minerals in and under land are a part of the realty and that the conveyance thereof must meet all the requirements of the provisions of the statutes governing the transfer of the title to land itself that we deem it unnecessary to take the Court's time in briefing and arguing this point. (Vol. 31, pages 578-580, *Texas Jurisprudence.*)

It is stated in Vol. 16, *American Jurisprudence*, page 448, that:

"In order that an instrument purporting to convey title to land or an interest or estate in land may be valid as a deed and operative to pass such title or interest in land, it is essential that there be a grantor, a grantee and a thing granted, and that it convey a present interest or estate."

In *Robertson et al vs. Vernon et ux*, 12 S. W. (2d) 991, a case by the Commission of Appeals of the State of Texas, adopted by the Supreme Court, where Billie Vernon and wife, Ruby Louise Vernon, instituted a suit against E. W. Robertson and Eva Robertson to cancel a mechanic's lien, deed of trust and a trustee's deed on a homestead. The principal ground of the attack was that plaintiffs had not appeared before the notaries public whose certificates were attached to the contract and deed of trust, and that such certificates were, therefore, void. The defendants joined issues generally and pleaded the defense of innocent purchaser on the part of Eva Robertson. The case was submitted to a jury upon special issues. Although the notary public whose certificates appeared upon the instruments testified positively that the parties did actually appear before him, the jury found that they did not and judgment was entered accordingly. The defendants appealed to the Court of Civil Appeals for the Eleventh District, and the case was affirmed (3 S. W. (2d) 573). Writ of error was granted because of the conflicts alleged in the application. The conflict is supposed to be with the decision in the cases of: *Hartley vs. Frosh*, 6 Tex 208, 55 Am. Dec. 772; *Davis vs. Kennedy*, 58 Tex. 516; *Oar*

vs. Davis, 105 Tex. 479, 151 S. W. 794; *Frelberg vs. De Lamar*, 7 Tex. Civ. App. 263, 27 S. W. 151; *Brand vs. Colorado Salt Co.*, 30 Tex. Civ: App. 458, 70 S. W. 578; *Texas Company vs. Keeter*, (Tex. Civ. App.) 219 S. W. 521; *Emmons vs. Jones* (Tex. Civ. App.) 246 S. W. 1052; *Cockerell vs. Griffith* (Tex. Civ. App.) 255 S. W. 490; and *Stewart vs. Miller* (Tex. Civ. App.) 271 S. W. 311.

The Court held that:

> "Correctly, the conflict is alleged to be with respect to the quantum of proof required upon the part of a vendor seeking to impeach a notary's certificate; the group of cases mentioned being cited for the holding that the uncorroborated testimony of the plaintiff in such a case will not overcome the recitations of the notary's certificate of appearance and acknowledgment, while in the present case that holding is repudiated.
>
> We have examined each of the cases referred to and have searched for others, but the examination has convinced us there is no conflict of holdings. In none of the cases relied on to show a conflict was the question the same as that involved and decided in this case. The question is: Is a grantor in an instrument of conveyance bound in any wise by the recitals in the certificate of acknowledgment attached by a notary public before whom the grantor never at any time appeared for the purpose of acknowledging the instrument?"

The court further said:

"It is thus found that the defendants in error (the Vernons) did not appear before the notaries public whose certificates were attached to the instruments involved, and this being true, the notaries were without authority or jurisdiction to attach any certificate whatever. The rule of evidence established in the line of cases headed by Hartley vs. Frosh, 6 Tex. 208, is a wholesome one, and there is no intention here to depart from it or in any wise to qualify it, but no cased cited or which we have found applies the rule to a case like this, where the grantor is shown not to have appeared before the notary at all. In such a case, the jurisdiction of the officer not having been invoked, his utterance is a nullity, and his certificate has no evidentiary force whatever, in favor of or against any one. It is not, therefore, a question of weighing evidence as between the certificate of the officer and the testimony of the attacking plaintiffs, for the purported certificate is not evidence. It is not like a case where the grantor appeared before the notary and that officer made a false certificate as to some other fact connected with the acknowledgment. Speer's Law of Mar. Rights, 204. In that case, it is a just rule for weighing the evidence that the certificate of the officer who is disinterested is more to be relied upon than the uncorroborated evidence of the interested grantor.

Not only is there no conflict created by the holding of the Court of Civil Appeals in that case, but we think the same is correct.

The first group of assignments presented in the application serve as a predicate for the proposition that

the uncorroborated testimony of the grantors, to the effect that they did not acknowledge such instrument before the notary public, is insufficient to destroy the validity of the notary's certificate attached to such instruments; but, as we have already pointed out, the notary's certificate, under the circumstances, has no validity. It is in legal effect no more than a forgery. Whether or not it has any validity depends upon the fact issue of whether no not the grantors appeared before the notaries for the purpose of acknowledging the instrument, and this issue in turn, like every fact issue in a civil case, is to be determined by a preponderance of all the evidence. There is no statute or rule of decision that would justify the trial court in instructing the jury upon such an issue that more than a preponderance of the evidence was required upon the part of the complaining grantors, and there is nothing in the statute or the decisions that would justify the instruction that the testimony of the interested plaintiffs alone would not be sufficient to support a finding in their favor.

The weighing of evidence in determining any fact issue necessarily includes the right and duty of the jury or court have jurisdiction to consider the relative trustworthiness of the notary's certificate and the impeaching evidence of the complaining vendor, the one a disinterested official and the other a vitally interested party. But this has to do only with *weighing* the evidence, and pertains to the *facts* of the case, and is a matter over which the Supreme Court has no jurisdiction whatever; the judgment of the Court of Civil Appeals in that respect being final. The authorities cited by the Court of Civil Appeals for its holding which we are sustaining, are decisive."

The authorities cited by the Court of Civil Appeals were *Wheelock vs. Cavitt*, 91 Tex. 679, 45 S. W. 796; *Stewart vs. Miller*, (Tex. Civ. App.) 271 S. W. 311; *Cockerel vs. Callahan* (Tex. Civ. App.) 257 S. W. 316; *Mission Bldg. & Loan Ass'n vs. Stoltz*, (Tex. Civ. App.) 282 S. W. 317; *Putman vs. Coleman*, (Tex. Civ. App.) 277 S. W. 213; *Cosgrove vs. Nelson* (Tex. Civ. App.) 269 S. W. 891; Id. (Tex. Com. App.) 277 S. W. 1118.

The Court of Civil Appeals in this case below held that:

> "The weight of authority, however, seems to be that, where it is shown that the parties did not appear before a notary for the purpose of acknowledging the execution of the instrument and no acknowledgment in fact was made, the notary's certificate to the instrument is not binding upon the grantors named therein and their property can not be destroyed or impaired by said certificate of acknowledgment."

Discussing the question of estoppel, as is pleaded here by appellees, the court further held:

> "Appellants contend that appellees are estopped from denying the execution of the mechanic's lien and deed of trust by reason of the fact that they accepted the work and went into possession thereof, and for nearly two years made the regular monthly payments. The contention is, we think, not tenable. There can be no estoppel where the truth is known to all the parties. 21 *C. J.* 1131; *Hutchenrider vs. Smith*, (Tex Com. App.) 242 S. W. 204."

It is well here to note that the court in the instant case found:

> "The defendants, C. B. Billington and J. C. Gilbreath, had previously engaged C. D. Davis to procure for them the oil, gas and minertl interest evidenced by said conveyance executed by C. B. Kennemer and wife, Lottie Kennemer, * * *"

thereby making the said C. D. Davis the agent of Billington and Gilbreath. Davis testified (R. 32, 34) that the Kennemers signed the deed when there was no grantee named in the instrument and no description of the land therein, and that they did not appear before the notary who appears to have executed the certificate. It is so well settled that a principal is bound by such knowledge on the part of his agent that we deem it unnecessary to argue or cite authorities, but this point will be briefly treated in subsequent pages of this brief.

The holding of the Supreme Court in *Robertson vs. Vernon*, supra, has not been set aside or modified, but, on the contrary, has been followed and approved in *Keller vs. Downey*, 161 S. W. (2d) 803; *Texas Osage Co-op. Royalty Pool et al vs. Kemper et ux*, 170 S. W. (2d) 849; and *Spoor et al vs. Gulf Bitulithic Co.*, 172 S. W. (2d) 377.

In *Keller vs. Downey*, supra, the exact question as here was before the court in an action in trespass to try title, attacking the deed on the ground that the grantors did not in fact appear before a notary. The jury found upon

the trial of the case that they did not appear in person before a notary, and judgment was entered for the plaintiff, cancelling and setting aside the deed on the ground that where a married woman did not appear in person before the notary taking the acknowledgment, the deed was void. The defendants appealed to the Court of Civil Appeals at Beaumont and, discussing this question, that Court said:

> "The jury found that appellee did not at any time appear in person before the notary public, J. J. Shoemaker, for the purpose of acknowledging the deed in issue. Appellants attack this find as being without support in the evidence, and as being against the great weight and preponderance of the evidence. Appellee, her husband and her mother testified that she signed the deed in her mother's bedroom and that the notary was not present. The evidence offered by appellee fully supports the verdict of the jury. Lummus vs. Alma State Bank, Tex. Civ. App., 4 S. W. (2d) 195; Chester vs. Brietling, 88 Tex. 586, 32 S. W. 527; Robertson vs. Vernon, Tex. Com. App., 12 S. W. (2d) 991, approving the holding in Tex. Civ. App., 3 S. W. (2d) 573; Putman vs. Coleman, Tex. Civ. App., 277 S. W. 213. Under these authorities, whether or not appellee appeared before the notary for the purpose of acknowledging the deed was to be determined on the preponderance of the evidence, like the general fact issues in all civil cases. To support this issue, appellee was not required to attach the notary's certificate by alleging fraud, coercion or undue influence; appellants can not, on this issue, invoke the proposition that the truth of the rectials in the notary's certifi-

cate can be attacked only by evidence clear, cogent and convincing.

Appellants contend that, even if the jury's finding has support in the evidence that the appellee did not appear before the notary for the purpose of acknowledging the deed, yet, on the undisputed evidence, on the verdict of the jury the notary's certificate 'was not entirely fraudulent' but was made 'at her implied request as the result of a previous understanding or established custom to dispense with her personal appearance'. On Mrs. Downey's evidence, she never appeared before the notary for the purpose of acknowledging the deed in issue, and never asked him to take her acknowledgment to this deed; she testified to a general custom whereby this notary would affix his certificate to her deeds when presented to him with her genuine signature thereto. These facts did not invoke the jurisdiction of the notary to take appellant's acknowledgment; his jurisdiction not being invoked, his certificate was void, and without appellee's acknowledgment thereto the deed in issue was void as to her. Gulf Production Co. vs. Continental Oil Co., Tex. Sup., 132 S. W. (2d) 553; Robertson vs. Vernon, supra."

In *Texas-Osage Co-op. Royalty Pool vs. Kemper*, supra, the court held that:

"Where a married woman appears before a notary to acknowledge instrument, fact recitals or notary's certificate of acknowledgment are conclusive, unless fraud or imposition is shown"

but then:

> "If married woman does not appear before a notary for purpose of acknowledging instrument, the notarial certificate does not preclude her from showing that nullifying fact."

In *Spoor vs. Gulf Bitulithic Co.*, supra, was a case tried in the District Court of Harris County, Texas, before the Honorable Allen B. Hanay, now United States District Judge for the Southern District of Texas. This was an action brought by Gulf Bitulithic Company against Mrs. Mattie Spoor and others to cover street paving costs. From a judgment for the plaintiff defendants appealed to the Court of Civil Appeals at Galveston, Texas. The jury had found in the trial court that the husband did appear before a notary and acknowledge the paving lien, but that the wife did not appear. In reversing and rendering the case in favor of the defendants, the Court said:

> "The trial court entered judgment for plaintiff, which recited the verdict, but did not set it aside, and certain stated findings by the court, being generally to the effect that the only testimony impeaching the mechanic's lien contract and the certificate of acknowledgment was testimony of Mrs. Spoor; the court concluding that the certificate of the notary, which was in due form to the purport that both Mr. and Mrs. Spoor properly appeared and acknowledged the instrument before him, was not subject to such impeachment, and then proceeding further to render judgment validating and foreclosing both such declared-upon liens, notwithstanding an express finding that

the property had so been the homstead of J. P. Spoor and Mattie Spoor, respectively, with personal award against Mrs. Spoor and Mrs. Walker, together with the latter's husband, for the amount of the indebtedness sued for, as well as a like recovery against the Houston Title Guaranty Company for $481.08.

As the fact issues submitted to the jury and the court's judgment for the appellee notwithstanding its verdict thereon presaged, the controlling question involved in the controversy was, as to whether or not the appellee company's declared-upon mechanic's lien contract, dated August 24, 1931, for asserted paving charges against the J. P. and Mattie Spoor homestead lot on Smith Street in the City of Houston was valid as such a lien against that property, which admittedly had at all material times, including the dates of execution of the contract and of her sale of the home of Ardis Phillips, been her homestead, as against her major defense that, while she had signed that document about the time of its date, she had never at any time ever appeared before the notary public, Percival, for the purpose of acknowledging such signing as her act and deed, nor had he ever acknowledged it as such before him or any other officer empowered to take acknowledgments.

Closely subsidiary to that controlling question was the secondary one as to whether or not the appellee's also declared-upon assessment lien, made in appellee's favor by the City of Houston in consideration of its having paved Smith Street abutting such Spoor property, on the 18th day of November, 1931, pursuant to the City's assumed power under Article 4-A, Section 7 of the Houston City Charter, was likewise valid as such.

Indeed, the appellee's brief itself thus characterizes what it termed 'the main issue'; 'The main issue in the whole case under the pleadings and under the evidence, was whether or not Mr. M. C. Percival, the Notary Public, went to the Spoor's residence with Mr. Powell for the purpose of taking the acknowledgments of Mr. and Mrs. Spoor'. But, as indicated, this court thinks that reflects only a prelude to the ultimate controversy, which was, whether or not Mrs. Spoor either in fact appeared before that notary for the purpose of acknowledging such written instrument as having been her act, or actually acknowledged it as such.

In the given state of the record, it is concluded that the jury's verdict, upon sufficient evidence, settled both of these issues of fact in favor of appellant, Mrs. Spoor, directly, and of her fellow appellants incidentally, requiring a consequent judgment in thier favor contrarily to that so entered by the court.

In other words, under the pleadings, the evidence, and the verdict, this was an instance of where the husband did sign and acknowledge a materialman's lien on the homestead for paving the abutting street, but the wife merely signed an instrument in form of that character but did not ever appear before the notary public for the purpose of acknowledging it as her act and deed, nor in fact did she so acknowledge it at all.

That being the indisputable character of the case as made, it did not lie within the power of the trial court to disregard the jury's findings that the wife neither so appeared nor acknowledged, since that simply amounted to the court's discarding the jury's finding upon a fact issue, and, on a cold collar, substituting

its own instead. Johnson vs. Moody, Tex. Civ. App., 104 S. W. (2d) 583; Gumm vs. Chalmers, Tex. Civ. App., 127 S. W. (2d) 942; Schumaker vs. Whiteside-Appling Motor Co., Tex. Civ. App., 144 S. W. (2d) 944; Walker vs. T. & N. O. R. R. Co., 150 S. W. (2d) 853.

The legal effect of such a verdict—that is, finding that the wife did not even appear before a notary for the purpose of acknowledging a claimed mechanic's lien on her homestead for such abutting street paving —has been settled with us to be that no such lien was entailed. Robertson vs. Vernon, Tex. Civ. App., 12 S. W. (2d) 996, 1001, points 5-6; Panhandle App., 41 S. W. (2d) 996, 1001, points 5-6; Panhandle Const. Co. vs. Flesher, Tex. Civ. App., 87 S. W. (2d) 273, 275. points 5, 6; Marinick vs. Continental Southland Savings & Loan Ass'n, Tex. Civ. App., 97 S. W. (2d) 480, 483, point 4.

Not only is it the law that no voluntary line of that character may be fastened upon the homestead in the absence of a properly executed and acknowledged mechanic's lien contract, but it is also equally well settled that the City of Houston was in this instance left without power to impose an involuntary lien on this homested of Mrs. Spoor, through the means of the paving assesement against the same, likewise declared upon by the appellee. City of Wichita Falls vs. Williams, 119 Tex. 163, 26 S. W. (2d) 910, 79 A. L. R. 704; Higgins vs. Bordages, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770; Barnett vs. Eureka etc., Tex. Com. App. 234 S. W. 1081; Uvalde Rock Asphalt Co. vs. Warren, 127 Tex. 137, 91 S. W. (2d) 321, 104 A. L. R. 1043, affirming Galveston Court of Civil Appeals, 59 S. W. (2d) 272; Summerville vs.

King, Sup., 84 S. W. 643; Harn vs. American Mutual etc., 95 Tex. 79, 65 S. W. 176.

Indeed, the appellee apparently does not seriously contend that it may herein recover upon the City of Houston's assessment lien in its favor, if the prop of the contract lien is first taken out from under it. It also seems to be the law that the finding that Mr. Spoor both appeared before a notary and acknowledged the materialman's contract declared upon becomes immaterial as affects the rights of Mrs. Spoor in this instance, since neither his acts nor representations in that respect estopped her from claiming her constitutional and statutory homestead rights. Burkhardt vs. Lieberman, 138 Tex. 409, 159 S. W. (2d) 847; Bower vs. Nelson, Tex. Civ. App., 138 S. W. (2d) 601, error refused; Thomas vs. Creager, Tex. Civ. App., 107 S. W. (2d) 705, error dismissed; Marklev vs. Barlow, Tex. Civ. App., 204 S. W. 1013; Uvalde Rock Asphalt Co. vs. Hightower, Tex. Com. App., 166 S. W. (2d) 681.

It follows from these conclusions, without the necessity for discussion as to the many procedural and incidental issues raised in the briefs of the parties, that neither asserted lien was valid against the property in Mrs. Spoor's hands, and that she and her daughter, Mrs. Walker, were clothed with the right to sell it to ther co-appellant, Ardis Phillips, free and clear of any such claimed lien.

It likewise follows that—there being no valid lien against the property under its homestead character in Mrs. Spoor, it not being her separate estate, both she and Mrs. Walker being married women on August 24 of 1931, and no privity of contract with reference there existing between the appellee and any

others of the appellants, none of them having been signers of or parties to the August 24 of 1931 instrument—there was no personal liability for the appellee's claimed debt resting upon any one of the appellants; especially was this the case as affected the Houston Title Guaranty Company as to the $481.08 it held in escrow out of the purchase price of the property by Ardis Phillips from Mrs. Spoor, subject to the outcome of this suit, since, as heretofore indicated, there was no privity of contract whatever between the Title Company and this appellee with reference to that fund; hence that transaction, in so far as affected appellee's claimed paving debts and liens against Mrs. Spoor and her daughter, was clearly res inter alios acta. R. S. Article 4623. Red River Nat. Bank vs. Ferguson, 109 Tex. 287, 206 S. W. 923; Lee vs. Hall Music Co., 119 Tex. 547, 35 S. W. (2d) 685; First Texas Joint Stock Land Bank vs. Webb, Tex. Civ. App., 82 S. W. (2d) 159, error dismissed; West Texas Const. Co. vs. Doss, Tex. Civ. App., 59 S. W. (2d) 866, affirmed Tex. Com. App., 96 S. W. (2d) 1116; Scanlan vs. Gulf Bitulithic Co., Tex. Com. App., 44 S. W. (2d) 967, 80 A. L. R. 852; Scanlan vs. Continental Inv. Co., 126 Tex. 401, 87 S. W. (2d) 476; Continental Inv. Co. vs. Armstead, Tex. Civ. App., 143 S. W. (2d) 1003, writ dismissed, correct judgment; Huelsebusch vs. Roensch, Tex. Civ. App., 141 S. W. (2d) 732, error dismissed, judgment correct; Cline vs. Niblo, 117 Tex. 474, 8 S. W. (2d) 633, 66 A. L. R. 916; Milner vs. McDaniel, 120 Tex. 160, 36 S. W. (2d) 992; Coleburn vs. Underwood, Tex. Civ. App., 53 S. W. (2d) 331; McFarland vs. Shaw, Tex. Com. App., 45 S. W. (2d) 193.

It may not be amiss to add that that the appelle is further inept in contending here (and the trial court

equally so in stating a finding to that resulting effect) that Mrs. Spoor neither pleaded nor offered evidence to show that there was any fraud on the part of the appellee company in initially procuring the signature of Mrs. Spoor to the mechanic's lien contract in question, and thereafter, upon that as a premise, uttering and declaring on it as a duly acknowledged lien.

She did in her answer and cross-action specifically allege, among other things, in paragraphs 4 and 5 thereof, this:

'In this connection, these defendants say that no such mechanic's lien was executed and acknowledged as pleaded; that if there is any acknowledgment by either the said J. P. Spoor or both, such acknowledgment is forged, fraudulent, illegal, or executed in violation of the law, for the reason that neither of the said parties ever appeared before a Notary Public and acknowledged any such instrument or any such mechanic's lien as alleged. * * * these defendants say that the purported mechanic's lien alleged in plaintiff's petition was procured fraudulently; that the said J. P. Spoor and wife, Mattie Spoor, never executed and acknowledged same, as alleged by plaintiff, that such purported mechanic's lien is not entitled to be recorded under the laws of this State and its recordation, with said fratudulent, forged and illegal acknowledgment annexed thereon, has cast a cloud upon the title to such property and these dedendants are entitled to have such cloud removed therefrom.'

In support of these allegations Mrs. Spoor testified unequivocally—supported by a number of attending circumstances shown—that she had never known that

the paper she admitted having signed (that is, the claimed lien contract herein sued upon) carried any provision for a lien against her home; that she did not read it, and that the appellee's secretary, upon whose statements she implicitly relied, in inducing her to so sign it, told her that it did not—that it was a simple little agreement between himself and them, Mr. and Mrs. Spoor—that she had never seen nor known the notary, Mr. Percival, and had never appeared before him for the purpose of acknowledging that paper at any time; further, that she had never paid anything on this paving cost, but had, at once upon her husband's death, advised the appellee that she never could nor would undertake to continue any payments he had been making thereon.

Further discussion is deemed unnecessary, since these conclusions determine the merits of the appeal; they require that the trial court's judgment be reversed, and that the cause be here rendered in favor of all of the appellants; it will be so ordered. Reversed and rendered."

In 1 *Texas Jurisprudence*, page 518 to 520 it is said:

"Although, generally speaking, a different rule prevails with respect to acknowledgments of other persons, yet it is settled by a long line of decisions that when the separate acknowledgment of a married woman is required, such acknowledgment is essential to the validity of the instrument executed by her. In such a case, the acknowledgment is not only an act or ceremony that imparts verity to the womans' deed, but is also a vital and essential part of the instrument; in other words, it is the acknowledgment and not the signature which gives validity to the writing." Citing many cases.

Continuing, it is there stated:

> "When an acknowledgment is required, an unacknowledged instrument of a married woman is, as to such woman, not voidable merely but absolutely void; the instrument, although signed, attested and delivered 'is as though it had never been written, is merely waste paper, is not her act and deed'. Citing Coffey vs. Hendricks, 66 Tex. 672, 2 S. W. 47; Whetstone vs. Coffey, 48 Tex. 269; Cross vs. Everts, 28 Tex. 524; Moore vs. Unknown Heirs of Gilchrist (Civ. App.), 273 S. W. 308; Cosgrove vs. Nelson (Civ. App.), 269 S. W. 891, affirmed 277 S. W. 1118. A fortiori the writing is wholly insufficient to divest her title, the property attempted to be conveyed by it may be recovered, it has been held, without refunding the consideration received."

Then in the same volume at page 601, after having reviwed the presumption of correctness that attaches to the notary's certificate, it is stated:

> "But this rule does not apply when the party never in fact appeared before the officer for the purpose of acknowledging the instrument in question." Citing Robertson vs. Vernon, supra. Putman vs. Coleman (Civ. App.), 277 S. W. 213; Colonial & U. S. Mtg. Co. vs. Thetford, 66 S. W. 103.

We think the law is well settled that, as above outlined, Davis being the agent of Billington and Gilbreath, there could be no question of estoppel or innocent purchaser in this case. *Hutchenrider vs. Smith*, 242 S. W. 204; *Stewart vs. Miller*, 271 S. W. 311; *Blum vs. White*,

111 S. W. 1066; *Cockrell vs. Callahan*, 257 S. W. 316, 320, 321; *Stephenson vs. Mallett*, 240 S. W. 633, 637.

In *Cosgrove vs. Nelson*, 269 S. W. 891, affirmed 277 S. W. 1118, it is said:

> "While Mrs. Cosgrove signed the deed from her husband and herself to Jenson, the undisputed evidence shows that she never acknowledged it and never appeared before Sherrill or any other officer for the purpose of acknowledging it. Without such acknowledgment, such deed was wholly insufficient to divest appellants of the title to the prtperty and, therefore, necessarily insufficient to vest Jenson with any interest therein. So far as the essences in the case are concerned, it was absolutely void, even as against innocent purchasers for value without notice."

Then in *Wheelock vs. Cavitt*, 45 S. W. 797, 66 Am. St. Rep. 920, as quoted in *Putman vs. Coleman*, 277 S. W. 213, it is said:

> "Where it is shown that the married woman has not appeared before the officer for the purpose of acknowledging the execution of the deed, and no acknowledgment has been in fact made, she having in no way invoked the exercise of the officer's authority in that respect, the certificate, however formal, is not binding upon her, even in favor of an innocent purchaser for value without notice. In such a case, the jurisdiction of the officer not having been invoked, his uttterance is a nullity, and his certificate has no evidenciary force whatever, in favor of or against any one. * * * A certificate of acknowledgment which falsely recites that the grantor named in a deed ap-

peared before the officer is not conclusive of the fact of appearance."

Construing a situation as here presented, that is to say, where the evidence upon which the trial court based his findings of fact is so uncertain, the United States Supreme Court said in *Northern Ry. Co. vs. Page*, 47 S. Ct. 491, 274 U. S. 65, 71 L. Ed. 929, reversing 3 F. (2d) 747:

"A verdict can not be sustained if essential facts are left in the realm of conjecture and speculation."

That Kennemer and his wife did not appear before a notary public and acknowledge the mineral deed is supported by the clear weight of the eivdence. Davis, the agent of respondents, testified that Kennemer and his wife came into his office and signed a blank mineral deed; and further testified that after they had added the description and other esssentials:

"Mr. Stevenson was in the office and I handed the instrument to him and told him to put his acknowledgment on it and we fixed it up.

Q. You told him they signed it in your presence?

A. Yes, sir.

Q. He signed this acknowledgment and put the seal on there the next morning?

A. Yes, sir." (R. 33, 34)

Craddock testified that there was no acknowledgment on the deed when he inserted the field notes in it, but that Kennemer and his wife's names were signed to it. (R. 77, 78)

C. B. Kennemer testified that he and his wife arrived at Davis' office around noon, that he was in a hurry to get to Daingerfield and she to get back to Como; that they executed the deed in blank and did not appear before a notary public. (R. 118, 122)

That there was no description of the land in the mineral deed at the time it was signed by Kennemer and his wife is equally true, and petitioners contend that the mineral deed here in question was void, because said description of the property was not in the deed at the time it was signed by Kennemer and his wife. We contend that all the evidence establishes this, and that there is no evidence in the record, unless the testimony offered by petitioners tending only to impeach the witnesses for petitioners may be considered as evidence, that the deed did contain such description. The agent of respondents, C. D. Davis, testified (R. 33) that he and Craddock filled in the description from the deeds left in their office by Kennemer either that night or late in the afternoon after the deed had been signed by the Kennemers; and Craddock testified that he had added the description in the deed, which he had taken from the old deeds left by Kennemer that morning, and that this was done either late in the afternoon or that night after Kennemer and wife had signed

the deed and left town (R. 77, 82). Kennemer himself testified (R. 118, 122) that at the time he and his wife signed it, there was no description of the property in the mineral deed; that the only correct description he had of the land in question was from the deeds given to him when he purchased the land, and that he only brought them with him to Davis when he and his wife appeared about noon that Monday; that he left the deeds with Davis for the purpose of writing the description of the property in the mineral deed.

Respondents contend that even the description of the property was not in the deed at the time it was executed by Kennemer and wife, that Kennemer and wife authorized Davis to fill in the description and made him their agent so to do, and that if Davis subsequently added the description in the deed, it would be binding on Kennemer and wife. Petitioners contend that this being the community homestead of Kennemer and his wife, they could not by a parol agreement authorize some one else to fill in this description in the deed, that such would be violative of the homestead provisions of the Constitution of the State of Texas, the statute of frauds, and the express statutory provisions of the State of Texas directing how homesteads and married women's property may be alienated. In other words, in an authority or power of attorney to get an agent to fill in the description of land constituting a homestead, or, even if it were not the homestead, the property of a married woman, all the re-

quirements of the Constitution and the statutes of the State of Texas would have to be met before such power of attorney could be given. In other words, it would have to be in writing, setting out the specific thing that was to be done, must be executed by both Kennemer and his wife, acknowledged before a competent officer, and the acknowledgment of the married woman be taken separately and apart from her husband, as required by the statutes of the State of Texas.

Both these propositions, that a deed is void unless the description is contained therein before its execution, and that an agent could not be appointed to add such description by parol agreement, were so ably discussed and determined in *Farmers Royalty Holding Co. et al vs. Jeffus*, 94 S. W. (2d) 255, also containing a complete brief of these questions, that we feel it should be quoted in full for the convenience of the Court. If not for the convenience of the Court, then it is petitioners' contention of what the law governing this case actually is, and we therefore so quote and adopt it, as our position before this Honorable Court. Omitting the formal parts of this case, we quote it as follows:

> "Appellee, George M. Jeffus, brought this suit in the district court of Houston County, Tex., against appellants, Farmers Royalty Holding Company, G. T. Blankenship, and Farmers Mutual Royalty Syndicate, Inc., to cancel a mineral deed executed by appellee and his wife on May 11, 1932, conveying to Farmers Royalty Holding Company an undivided 3/8ths

interest in the oil, gas and other minerals in 218.4 acres of land (4 tracts) out of the J. A. Aughinbaugh, the J. J. Estrado and M. J. Chamars leagues in Houston County, Tex., and to cancel a mineral deed they had executed on said May 11, 1932, conveying to appellant G. T. Blankenship an undivided 1/8th interest in all of the oil, gas, and other minerals in the above described land; and to set aside and cancel a mineral deed executed by G. T. Blankenship on March 30, 1934, conveying to appellant Farmers Mutual Royalty Syndicate, Inc., an undivided 3/32nds in and to the oil, gas, and other minerals in said land.

As grounds for his action to cancel, appellee alleged: (a) That on May 11, 1932, he was the owner in fee simple of four certain tracts of land in Houston County, Tex., the first, 101.7 acres, more or less, and the second, 30 acres, more or less, portions of the J. A. Aughinbaugh league; and the third, 61¾ acres, more or less, a part of the J. J. Estrado league; and the fourth, 25 acres, more or less, a part of the M. J. Chamars league; (b) that at the time, May 11, 1932, he and his wife executed and delivered the deed to the Farmers Royalty Holding Company, the land constituted their homestead, and said deed did not contain a description of any land whatever, but contained a blank space for the insertion of a description of the property intended to be conveyed, and therefore said deed was void; (c) that the signatures of appellee and his wife to the deeds sought to be cancelled were obtained by the false and fraudulent representations of appellants Farmers Royalty Holding Company to the effect that said deed was a conveyance of only a portion of the royalty interest in said lands and that he would receive

within ninety days a dividend check on same and every ninety days thereafter he would receive dividend checks, which representations were false and fraudulent and made for the purpose of deceiving and misleading appellee and his wife and of inducing them to execute said deed, and that they believed said representation and relying thereon did execute said conveyance; (d) that appellant Farmers Royalty Holding Company, and its agent securing said deed, confederating with the notary who took their acknowledgment to said deed, fraudulently represented to appellee and his wife that their executing said deed would in no way interfere with their leasing the whole of their said land for oil and gas purposes, and receive rentals therefor, and that the notary joined in such statement, which representation was false and fraudulent and made for the purpose of misleading and inducing them to execute said conveyance without reading same, and that he and his wife believed said false statement, and relying upon same did execute and deliver said deed without reading same, and that they did so because of said false and fraudulent representations; (e) that when the said conveyance was executed by him and his wife it did not contain the description of any land whatever, but that a blank space was left in said conveyance for the insertion of the property intended to be conveyed, and that after the delivery of said deed, without their knowledge or consent, appellant Farmers Royalty Holding Company fraudulently inserted in said blank space other and different property than that intended to be conveyed, to wit, a tract of 61¾ acres which contained appellees' orchard and nursery, and which it was definitely understood and agreed was not to be included, and which fraudulent

inclusion was a forgery and a fraud upon appellee and his wife, and rendered said deed void; (f) that the notary who took his and his wife's acknowledgment did not take his wife's acknowledgment in accordance with the requirements of the law in that he did not examine her separately and apart from her husband, and did not explain the instrument to her, and she did not acknowledge to him that she had executed said instrument willingly for the purposes therein expressed and that she did not wish to retract same, and that the land was the homestead if him and his said wife, wherefore said deed was void; (g) that appellee received no consideration for said deed other than 81 shares of stock in said Farmers Royalty Holding Company, which were then and at all times since worthless, wherefore the deed to the mineral interest conveyed by them was without consideration and should be cancelled.

Appellee made substantially the same allegations as grounds for cancelling the deed to G. T. Blankenship, conveying to him a 1/8th of the oil, gas and other minerals in the land. As grounds for cancelling the deed of March 30, 1934, from G. T. Blankenship to Farmers Mutual Royalty Syndicate, Inc., conveying 3/32nds interest in the oil, gas and other minerals in said lands, appellee alleged that such instrument created a cloud upon his title, which should be removed; that Blankenship and T. P. McLain were agents for and of the Farmers Mutual Royalty Syndicate, Inc., said Blankenship then and there and ever since being its president; and that Farmers Mutual Royalty Syndicate, Inc., at the time of the execution and delivery of such instrument had full knowledge that the deed to Blankenship had been obtained by

false and fraudulent representations of said McLain. Appellants answered by general demurrer, special exceptions, general denial, and specially that appellee was guilty of laches in bringing his suit, and Farmers Royalty Holding Company answered that it was the owner of 3/8ths of the minerals in the land described in appellee's petition by virtue of the deed executed and delivered to it by appellee and his wife on May 11, 1932, and also that it was th owner of a 1/32nds interest in said minerals conveyed to it by G. T. Blankenship prior to the filing of this suit. Farmers Mutual Royalty Syndicate, Inc., answered that it was the owner of an undivided 3/32nds interest in the minerals in said land by virtue of a conveyance of said interest to it by G. T. Blankenship prior to the filing of this suit by appellee. Further specially answering, said appellants alleged that appellee had recognized, affirmed, and ratified and was, therefore, estopped to deny their ownership and interest in and to said mineral interest in said land by joining appellants in leasing said property for oil and gas purposes, consenting to an acquiescing in appellants receiving their proportionate part of lease rentals, and had waived any fraud, if any existed, in connection with the transaction of procuring conveyances from appellee and his wife to said mineral interest and in completing the description of the land mentioned in said deeds after they were executed and delivered.

Appellee by supplemental petition replied to the answer of appellants, defendants, denying the defensive matters pleaded and reiterated the various grounds formerly alleged for the cancellation of the several instruments.

The cause was tried to the court without a jury and judgment rendered cancelling each of the deeds complained, and adjudging to appellee all of the oil, gas and other minerals conveyed to appellants by said mineral deeds. The court filed his findings of fact and conclusions of law. There is in the record a statement of facts containing all of the evidence adduced, agreed to by the parties, and approved by the court.

The court found, and there is ample evidence to sustain the finding, that the deeds when executed and delivered to T. P. McLain, the agent of the Farmers Royalty Holding Company and of G. T. Blankenship, conveying 3/8ths of the mineral interest in the lands described in appellee's petition to said Farmers Royalty Holding Company, and 1/8th of the mineral interest in said lands to G. T. Blankenship, on May 11, 1932, contained no description of any land whatever, and concluded, as a matter of law, that because of the entire lack of description of any land, the deeds were void. That a conveyance of land, or of an interest in land, which does not contain a description of same is void, is too well settled to require discussion or citation of authority. But appellants say that Jeffus and his wife at the time of executing the deeds authorized T. P. McLain, the agent of appellants, to fill in the description of the tracts of land a portion of the minerals in which had been conveyed, and that under such authority he did so, and hence the deeds were valid and effective. It was a contested fact as to whether the filling in was done at the time of the execution and delivery of the deeds, and the court, as stated above, found that at the time Jeffus and wife signed and acknowledged and delivered the

deeds, there was no description of any lands whatever in said deeds. The record amply supports this finding. For want of description of the property conveyed, the deeds were absolutely void.

Appellants say that if the deeds were void, when delivered, that appellee ratified them afterwards by recognizing and affirming them in an oil lease. This contention is denied by appellee. The facts are that after the deeds were delivered McLain filled in the blank description and without the knowledge or consent of Jeffus and his wife included in the deed and description the 61¾ acres (the orchard tract) which it was agreed should not be included, and then filed the deeds for record. Jeffus and wife not knowing of the fraudulent inclusion of the orchard tract. Mrs. Jeffus died in September, 1932. The lands constituted the homestead of Jeffus and wife, and there were six minor children left by Mrs. Jeffus, and Jeffus continued to occupy the land as a homestead all of the time. It is not believed that the deeds being void for want of description when acknowledged and delivered could be ratified by the acts of Jeffus and thus given efficacy. Finkelstein vs. Roberts (Tex. Civ. App.) 220 S. W. 401, 405 (writ dismissed); Lasater vs. Jamison (Tex. Civ. App.) 203 S. W. 1151, 1154 (writ refused); Merriman vs. Blalack, 56 Tex. Civ. App. 594, 121 S. W. 552, 557 (writ refused); Drury vs. Foster, 2 Wall. 24, 34, 17 L. Ed. 780, 781.

In Merriman vs. Blalack, supra, Mrs. Merriman conveyed a tract of land which was her separate property without being joined by her husband. This deed was void. Later, Mrs. Merriman became a feme sole. It was insisted that the void deed was ratified by Mrs. Merriman after she became a feme sole by the

recital in a deed from her and others to a third party that the land had been conveyed by Mrs. Merriman to Henry Merriman. It was held that:

'The deed from Mrs. Merriman to Henry Merriman being clearly void, we do not think that this recital can be given effect as a confirmation, validation or re-execution of it, so as to make it operative as a conveyance of Mrs. Merriman's title. This recital can not operate as a conveyance or a re-execution of the former void deed.'

'Confirmation may make good a voidable or defeasible estate, but can not operate upon an estate void in law, but only confirms its infirmity. * * *

There are no 'apt words of conveyance' from Mrs. Merriman, in the bare recital in the deed to Guzman, that the land had been conveyed by Elizabeth Merriman (Mrs. Merriman) to Henry Merriman, along with the other recitals as to the chain of title, so as to make it operate as a new grant, without which such recitals could not operate to impart to the void deed an efficacy it did not before possess.' (writ refused).

In Lasater vs. Jamison, supra, Mrs. Peel, a married woman, who at the time was separated, but not divorced from her husband, conveyed her interest in community land, not being joined in the conveyance by her husband. Later, in a conteest as to the title to the interest conveyed by Mrs. Peel, and in which it was contended that her husband after such conveyance had recognized and acquiesced in said conveyance, it was held (quoting from eighth paragraph of the syllabus of the opinion) 'where a married woman conveyed her interest in community land, her deed,

being a nullity, could not be vitalized by her husband's subsequent acquiescence, but could only be ratified by an act by him having the essential elements of a conveyance. (Writ refused.)

Finkelstein vs. Roberts, supra, was a case somewhat similar in some of its parts to the instant case. There Roberts and wife had a rural homestead consisting of three tracts. They resided on one of the tracts containing 3 acres. They executed an oil lease on their lands, reserving from the lease the 3-acre tract. When the lease was drawn, signed, and acknowledged and delivered by Roberts and his wife, the description of the land leased was left blank, but they authorized the blank to be filled by the insertion of the land leased. Afterwards this blank description was filled in and the 3-acre tract was included along with the two tracts intended to be leased, this without their knowledge or consent. About a year afterwards Roberts discovered that his 3-acre home place had been included and he filed suit to cancel the lease contending that the lease having been executed, acknowledge and delivered in blank form was a nullity. From a judgment in the case, an appeal was taken to the Fort Worth Court of Civil Appeals. The court held:

'The majority are inclined to view that, inasmuch as under our statutes a married woman can not convey any interest in either the homestead or in her separate property without having been joined by her husband and having the instrument fully explained to her and acknowledged before a proper officer, and inasmuch as it has been held that the usual oil lease conveys an interest in the land, therefore the original lease at the time of its acknowledgment by Mrs. Rob-

erts, having contained the blank for description, as hereinbefore stated, was inoperative, and that she could not by parol authorize any one to fill the blank, and that, the blank having been filled in the instance before us, and no subsequent acknowledgment of the lease having been made by the wife, the lease was entirely void. The writer, however, does not feel prepared to go so far under the circumstances of this case. While the contention of appellee and the position of the majority on this point is sustained by common law authorities and by decision of some of the other states, a number of which are cited in behalf of appellee, the rule in Texas has not been enforced with such strictness.'

Citing Threadgill vs. Butler, 60 Tex. 599; Schleicher vs. Runge (Tex. Civ. App.) 37 S. W. 982; Henke vs. Stacy, 25 Tex. Civ. App. 272 61 S. W. 509; McCown vs. Wheeler, 20 Tex. 372, 373; Tarrant County vs. McLemore, (Tex. Sup.) 8 S. W. 94; Gray vs. Fennimore, (Tex. Com. App.) 215 S. W. 956. Of the cases cited, in the main they were where the name of the grantee was left blank and authority given to fill in same. None of them were cases where, as in the case there discussed, or in the instant case, the wife was a party to the instrument and her acknowledgment required to be taken as required by statute. Application to the Supreme Court for writ of error was dismissed.

In Drury vs. Foster, supra, the Supreme Court of the United States said:

'But there are two insuperable objections to this view in the present case. First, Mrs. Foster was disabled in law from delegating a person, either in writ-

ing or by parol, to fill up the blanks and deliver the mortgage; and, second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the feme covert and of the officers were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing.'

Furthermore, it is not believed that the question of ratification was raised. The instrument, and oil lease executed by Jeffus on February 2, 1934, long after his wife's death, in which he was joined by appellants, contained this clause:

'10. All lessors herein agree that mineral deeds properly executed and now of record conveyed to G. T. Blankenship an undivided 1/8th interest, and to Farmers Royalty Holding Company, a Delaware corporation, an undivided 3/8th interest in and to all oil, gas and other minerals in, under, and upon the lands described herein.'

This was the only and all of any reference to any instrument, executed by any person or persons, relative to the conveyance of any interest in the minerals in said land. For such reference in the lease to have amounted to a ratification of the void deeds of May 11, 1932, if they could at all be ratified, the ratification clause or portion of the instrument containing same must have been such as would amount to a present conveyance of the property involved, that is such as would then convey title within itself, which we deem the clause above referred to insufficient. Montgomery vs. Hornberger, 16 Tex. Civ. App. 28,

40 S. W. 628 (writ refused); Lasater vs. Jamison (Tex. Civ. App.) 203 S. W. 1151. And, too, it is not believed that Jeffus could ratify the void deeds in question. The land involved was the homestead of himself and wife and so occupied at the time the deeds were executed. His wife died after the delivery of the void deeds to appellants. She left minor children who inherited her half of the community homestead, and who at her death and continually since have resided with their father on the homestead. The homestead never having been abandoned by their father, but continuing to be his and their homestead. Jeffus could not by reference to the void deeds as properly executed, if such reference in the oil lease sufficiently specifically referred to the deeds, give vitality to that which then and at all times since was dead—without effect—void.

We do not deem it necessary to discuee other grounds of invalidity authorizing the cancellation of the instruments in controversy, pleaded by appellee and found by the court in his favor. From what we have said, it follows that the judgment should be in all things affirmed and it is so ordered. Affirmed."

The contention above is ably supported and affirmed, both as to the description of the property and the acknowledgments of the grantors, in *Farmers Royalty Holding Co. vs. Duren, et ux*, 94 S. W. (2d) 259, and *Farmers Royalty Holding Co. vs. Alderman et al*, 94 S. W. (2d) 261.

Petitioners earnestly contend that this Court, if not bound by the construction of the law in these respects

by the Texas courts, then it is certainly bound by that construction in *Drury vs. Foster*, 2 Wall. 24, 34, 17 L. Ed. 780, 781.

In *Blankenship vs. Mott*, 104 S. W. (2d) 607, another case in which the question here before the Court is ably discussed, it is held:

> "That a conveyance of land, or of an interest in land, which does not contain a description of same, is void, is too well settled to require discussion of citation of authority."

When counsel for respondents had finished their cross-examination of C. B. Kennemer, the trial court said:

"I understand the law about this business, but just answer me this: How can you from a moral standpoint justify this claim after you sold this mineral interest and it conforms to the terms you agreed to sell it on, and you got your money?"

and continuing:

"How do you justifiy bringing this law suit?"

to which Kennemer answered:

"I don't know whether there is any justification or not, it's just a matter of fact." (R. 143)

Kennemer was not learned in the law, but that question was answered in *Drury vs. Foster*, supra, many years before that learned court was on the bench. Answering this question, the Supreme Court said in that case:

"It is insisted, however, that Mrs. Foster should be estopped from denying that she had signed and acknowledged the mortgage. The answer to this is, that to permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate in procuration. It would introduce into the law an entirely new system of conveyance of the real property of femes covert. Instead of the transaction being a real one in conformity with established law, conveyances by signing and acknowledging blank sheets of paper would be the only formality requisite. The consequences of such a system are apparent and need not be stated. * * *

We may regret the misfortune of the complaint from the conclusion at which we have arrived; but it seems to us impossible to extend the relief prayed for by bill of foreclosure, without abrogating the protection which the law for ages has thrown around the estates of married women. Losses of this kind may be guarded against on the part of dealers of real estate by care and caution; and we think that this burden should be imposed on them, rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life even when all the privileges with which the law surrounds them are left unimpaired."

BRIEF OF THE ARGUMENT UNDER PROPOSITIONS NOS. 6 AND 7, GERMANE TO SPECIFICATIONS NOS. 1-12, INCLUSIVE

The court's finding of fact No. 11 (R. 243) that the land here in question was the Kennemer's homestead, is supported by the uncontradicted testimony. In addition to the testimony of Davis, Craddock and Cain already pointed out, Gilbreath and Billington had theretofore filed a suit in Wood County, Texas, against C. D. Davis and O. W. Craddock in which they alleged that they had secured the services of Davis as their agent in the taking of the lease (R. 149, 152). That the knowledge of Davis of the circumstances surrounding the execution of this mineral deed is imputed to Gilbreath and Billington is, as heretofore stated, well settled. But, in view of the findings of the court and contentions of respondents, we deem it advisable to briefly treat this proposition.

In 2 *Texas Jurisprudence*, page 563, it is said:

> "It is a settled rule of law that notice to his agent when acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to the principal (Morrison vs. Insurance Company of North America, 69 Tex. 353, 363, 5 Am. St. Rep. 63, 6 S. W. 605; Kauffman & Runge vs. Robey, 60 Tex. 308, 40 Am. St. Rep. 264; Western Weighing & Inspection Bureau vs. Armstrong (Com. App.) 288 S. W. 119, reversing 281 S. W. 244; L. B. Menefee Lbr. Co. vs. Davis-Johnson Lbr. Co., 13 S. W. (2d) 62 (applying the rule to a principal who

pays a commission to a broker); Dixon vs. United States Fidelity & Guaranty Co., (Civ. App.) 293 S. W. 291; Chapman vs. Denton (Civ. App.) 288 S. W. 252; Interstate Automobile Ins. Co. vs. Edens (Civ. App.) 235 S. W. 671; Burns vs. Veritas Oil Co. (Civ. App.) 230 S. W. 440; Kuykendall vs. Schell (Civ. App.) 224 S. W. 298; Bergman Produce Co. vs. Brown (Civ. App.), 172 S. W. 554; American Express Co. vs. Parcarello, (Civ. App.) 162 S. W. 926, 929, error refused, 'stating that knowledge by an agent sustaining the relationship of a vice-principal is always imputed to the principal so as to fix responsibility upon the latter); Rodgers-Wade Furn. Co. vs. Wynn, (Civ. App.), 156 S. W. 340; West Lbr. Co. vs. Chesser, (Civ. App.), 146 S. W. 976; College Park Electric Belt Line vs. Ide, 15 Civ. App. 273, 40 S. W. 64, writ of error dismissed, 90 Tex. 509, 39 S. W. 915, citing Seale vs. Baker, 70 Tex. 283, 290, 8 Am. St. Rep. 592, 7 S. W. 744). For a concise summary of the law as to imputed knowledge, see 3 Tex. Law Rev. 202. In other words, under general and settled principles of law and equity, the acts of a duly authorized agent within the scope of his authority bind the principal, and carry to him constructive notice of all material facts comprised in the transaction. (Goldstein vs. Union Nat. Bank, 100 Tex. 555, 213 S. W. 584, answers to certified questions conformed to Goldstein vs. Union Nat. Bank of Dallas (Civ. App.), 216 S. W. 409; Holmes vs. Uvalde Nat. Bank, (Civ. App.) 222 S. W. 640, 642 (Citing Allen vs. South Boston Railroad Co., 150 Mass. 200, 15 Am. St. Rep. 185, 5 L. R. A. 716, 23 N. E. 917.) It does not matter that the principal has not been actually informed of the matter in question; it being the duty of the agent to communicate

to his principal all matters affecting the principal's interest that may come to his knowledge. (See infra, Sec. 159, as to further reasons for the rule), the law charges the principal with notice whether he actually received it or not. (Travelers Ins. Co. vs. Scott (Civ. App.), 218 S. W. 53, writ of error refused (citing 21 R. C. L. 828, Sec. 12); General Bonding & Casualty Ins. Co. vs. Beekville Ind. School Dist. (Civ. App.), 156 S. W. 1161, writ of error refused.) Nor does it necessarily exonerate the principal from the consequences of the rule that the agent testifies positively that he had no knowledge of the fact that is sought to be imputed to the principal. If the agent, acting within the scope of his authority, acquires knowledge of facts which, if followed up, would inevitably lead to a disclosure of the character of an adverse claim, the principal is charged with notice of the facts relating to the claim. (La Brie vs. Cartwright, 55 Civ. App. 144, 118 S. W. 785, 788; D. June & Co. vs. Doke, 35 Civ. App. 240, 80 S. W. 402, 405; Ferguson vs. McCrary, 20 Civ. App. 529, 50 S. W. 472, 475; Rand vs. Davis (Civ. App.), 27 S. W. 939 (see instruction to jury at page 941).

BRIEF OF THE ARGUMENT UNDER PROPOSITIONS NOS. 1-8, INCLUSIVE, GERMANE TO SPECIFICATIONS OF ERROR NOS. 1-12, INCLUSIVE

We have treated somewhat in detail the positive evidence introduced in support of petitioners' contentions. Likewise we have in a general way pointed out that the only evidence to support the findings of fact against them is such evidence as might tend to impeach the

witnesses, Davis, Craddock, Kennemer and Mrs. Bernice Robinson, and whatever presumption there might be in afvor of the recitations of the notary's certificate of C. W. Stevenson. We think that we have unquestionably shown by the decisions of the courts that where the executors of an instrument do not in fact appear before the notary alleged to have taken the acknowledgment, there is no presumption in favor of the correctness of such certificate. "It shall be treated as but a forgery" (*Robertson vs. Vernon*, supra.) Then we face the proposition as to whether or not the testimony tending to impeach such witnesses has such probative force as would warrant the finding of fact of the trial court; also as to whether or not a trial court may disregard all positive evidence and base his findings of fact on the proposition that all the witnesses for petitioners were unworthy of belief, and by his actions leave the parties where he found them.

Then we think it well to review such testimony as offered by respondents that they rely upon. We know the well settled rule that in weighing the testimony of witnesses, search should be made as to the interest of such witnesses in the outcome of the proceedings before the court and to see if such interest might affect this testimony, and to what extent. We contend that, certainly, Billington is as interested in this case as Kennemer. Senator Suiter's testimony (R. 161) in our opinion is germane only to the question of ratification, which we

have treated above. Taking his testimony at face value and conceding the truth of all of it would not affect the issues here involved. As a matter of fact, it is more favorable to petitioners than to respondents. He stated, as above set out, that he drew the alleged ratification instrument for the sole and only purpose of correcting the description of the property conveyed, and said that he stated to petitioners that its only effect was to correct such description, which certainly can not be, under the decisions above cited, a ratification of the void mineral deed.

It has been the pleasure of one of the counsel writing this brief to have been collegemates with both Messrs. Ramey and Calhoun and to have known them as honorable and able lawyers for the many years since. It certainly is not our position that they would intentionally and knowingly "stretch a point" for their client, but they are able trial court lawyers, as has been the glorious past of each member of this Court, and as this Court so well knows, the enthusiasm of such trial court lawyers often causes them to be as interested in the outcome of their cases as the client they represent. This is not only natural, but right, and counsel's impeaching testimony as to what took place in the office should be so weighed.

The testimony of Mrs. Alice Niblack, secretary to counsel for respondents, (R. 183, 189), is that what she had written was the words of Mr. Ramey after he had had a conversation with C. D. Davis. We particularly call the

court's attention to the fact that the statements relied upon by respondents to impeach the testimony of Davis were insufficient in all things for that purpose. He stated that at the time he talked to Messrs. Ramey and Calhoun, his memory was not so clear on these points. We contend that he did not at any time say that the deed was regular in all respects, including the grantee, the description and acknowledgment, but merely that at the time he talked to these lawyers, he did not recall the details. Furthermore, Davis' opinion could not be binding on anyone. He did not qualify as an expert. He is merely a layman, not a lawyer. We also wish to particular call the court's attention to the testimony of Mrs. Niblack (R. 187) when upon cross-examination the question was asked her:

"Q. Do you remember him (Davis) saying at the time the mineral deed was prepared that the name was left blank?

A. Yes.

Q. The grantee's name was left blank?

Mr. Ramey: That's not what's in the instrument.

Mr. Lattimore: What's in this instrument would not be admissible.

The Court: She can testify by recollection as to anything he said."

RE-DIRECT EXAMINATION

"By Mr. Ramey:

Q. Counsel asked you whether or not Mr. Davis said anything about the grantee in the mineral deed being made blank. Did you mean the mineral deed or assignment of the mineral deed?

A. The thing to Mr. Billington.

Q. The thing to Mr. Billington, what do you mean?

A. He said he prepared the instruments in blank and took them to Milo Cain's office and, as I recall, he said he left every one of these grantees blank in that, so that Mr. Cain or somebody down there could fill them in.

Q. In the instruments there were made to Mr. Billington?

A. Yes.

Q. Read the last paragraph and refresh your memory.

A. Yes, sir.

Q. What is your recollection about it as to whether or not the grantee in the Kennemer deed was left blank?

A. I had the instruments mixed up, Mr. Ramey. I am talking about the assignment from Mr. Davis to Mr. Billington or to blank, he didn't know who got them.

Q. Did he say anything with reference to the name of the grantee in the deed Kennemer signed being blank?

A. No, I don't remember it."

We contend that there was only one assignment from Davis to Billington and that was the one concerning the Kennemer deed, the testimony being that someone had inadvertently added Davis' name as grantee. It is particularly interesting to note that she answered:

"He said he prepared the instruments in blank and took them to Milo Cain's office and, as I recall, he said he left *every one* of these grantees blank, in that, so that Mr. Cain or somebody down there could fill them in."

Certainly, if she had meant only the assignment from Davis to Billington of the Kennemer interest, she would not have referred to it as "every one of these instruments."

Gilbreath testified (R. 196) that Kennemer told him that Davis contacted him at the Coke store; that Kennemer made a deal with him but told him that he would have to get his field notes, that it would be a day or two before he went to Winnsboro, and he would bring his field notes in to Winnsboro and complete the instruments there. Kennemer told him that he took his wife and the deeds from which the description should be added to the mineral deed to Davis' office the following morning, and when they got to Winnsboro they went direct to C. D. Davis' office, signed the instrument and made acknowledgment; that neither Craddock nor Davis was there; that they went before Stevenson and acknowledged the deed. Gilbreath further testified (R. 197) that Kennemer told him

the deed was complete when they signed it. We would like to call the court's attention to the inconsistencies of this testimony. Gilbreath testified that Kennemer told him the description was to be added in from the deeds that Kennemer took to Winnsboro. We would like to ask how it could be that where there is no question but that Davis and Craddock prepared this mineral deed, it could have been completed and ready for the Kennemers to sign when they arrived at Davis' office, and that "neither Davis nor Craddock was there." It has been conclusively proven and undisputed that the mineral deed could have only been prepared with reference to the description from the field notes of the deeds that Kennemer brought with him when he arrived at Davis' office. There is no evidence from any source that the Kennemers ever made more than one trip to Davis' office, and that was the day that they brought in the deeds containing the field notes, signed the mineral deed in blank, and left immedately, Mrs. Kennemer going back home to Como and Kennemer going to Daingerfield.

The trial court seemed to be satisfied with Gilbreath's testimony and that of the other witnesses of respondents, whose testimony at best tended only to impeach, because when he finished testifying the court made the statement that he didn't care to hear any thing further. (R. 212). Then he must have concluded his findings of fact upon the testimony of these witnesses whose testimony at best so tended only to impeach. We have called the court's at-

tention to what we believe the only material portions of the testimony of respondent's witnesses, if there is any to be attached to their testimony. Gilbreath testified that Kennemer had told him a set of facts which were physically impossible. He testified that Kennemer had told him that he took with him and his wife to Davis' office the deeds from which the description of the property was to be added in the mineral deed. Yet Gilbreath testified that Kennemer told him that the deed was all prepared and the description was in it when he arrived at Davis' office and that neither Davis nor Craddock was present. It is undisputed and its is physically impossible that the description which was added in the mineral deed could have been had from any other source than the old deeds that Kennemer took to Davis' office. It is stated in *Austin vs. Neiman*, 14 S. W. (2d) 794 at page 796 by the Supreme Court of the State of Texas that:

> "While trial courts are allowed a wide latitude in determining the credibility of witnesses and the weight to be given to their testimony, this does not go to the extent of permitting the testimony as to a given fact to be allowed weight when the undisputed physical facts show that it is impossible for such testimony to be true."

This Court cited and approved that doctrine. In *United States vs. Crume*, 54 F. (2d) 556. Then again citing and approving the above doctrine, this Court in *Magnolia*

Petroleum Co. vs. National Labor Relations Board, 112 F. (2d) 545, said:

> "In its capacity as a tryer, the Board (National Labor Relations Board is held to the same high standard of impartiality and fairness that a jury is held to, and its findings, just as those of a jury, 'must rest on probabilities, not bare possibilities'. Samulski vs. Menasha Paper Co., supra. 'Verdicts can not rest upon guess or conjecture'. Shapleigh vs. United Farms Co., 5 Cir. 100 F. (2d) 287, 289.
>
> 'The doctrine of these cases condemns the grounding of a verdict upon such shadowy proof as not to establish the vital facts to a reasonable certainty.' Samulski vs. Menasha Paper Co., supra. Findings of the Board just as jury findings must rely upon something firmer than mere suspicion, conjecture or surmise. *United States vs. Crume*, 54 F. (2d) 556, 558; *Austin vs. Neiman*, Tex. Com. App., 14 S. W. (2d) 794; *Community Natural Gas Co. vs. Henley*, Tex. Com. App., 24 S. W. (2d) 10; *Baltimore & O. Ry. Co. vs. Groeger; Gunning vs. Cooley*, supra. 'The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla of which gives equal support to inconsistent inferences'."

The above rule was also ably discussed, and the above cases cited, in *Helmerich-Payne, Inc., vs. Debus*, 148 S. W. (2d) 243. Also citing and approving the principle laid down in the above cases, the Court of Civil Appeals of Texas in *Houston Fire & Casualty Ins Co. vs. Biber et al*, 146 S. W. (2d) 442, said:

> "If the probative force of evidence be so weak that it raise only a surmise or suspicion of the existence of a fact sought to be established, that evidence in legal contemplation is 'no evidence' and will not support a finding which comprehends the existence of disputed facts". Citing *Joske vs. Irvine*, 91 Tex. 574, 44 S. W. 1059; *Austin vs. Neiman*, supra.

Then in *Blum Milling Co. vs. Moore-Seaver Grain Co.*, 277 S. W. 78, the Commission of Appeals of the State of Texas said:

> "Neither a jury nor an appellate court on a proper review may rightfully ignore physical conditions by which a witness is circumstanced of the maxima potentialities of his vision."

Then we contend that the findings of fact of the trial court in this case cannot be based on any substantial testimony that meets the requirements of the doctrine laid down in the above cited cases and, viewed in the light of the trend of the decisions under Rule 52, are certainly against the clear weight of the evidence, and, therefore, clearly erroneous.

BRIEF OF THE ARGUMENT UNDER PROPOSITIONS NOS. 1-8, INCLUSIVE, GERMANE TO SPECIFICATIONS OF ERROR NOS. 1-15, INCLUSIVE

It is now unquestionably not only the privilege but the duty of the appellate courts to review the findings of fact of the trial court below to ascertain whether or not the evidence is sufficent to support such findings of fact. *Rules of Civil Procedure* No. 52(a) provides:

> "The provisions of the U. S. C., Title 28, 773 (Trial of Issues of Fact; by Court) and 875 (Review in Cases tried without a Jury) are superseded in so far as they provide a different method of findings of fact and a different method of appellate review. The rule stated in the third sentence of Subdivision (a) accords with the decisions on the scope of the review in modern federal equity practice. It is applicable to all classes of findings in cases tried without a jury whether the finding is of a fact concerning which there was conflict of testimony or of fact deduced or inferred from uncontradicted testimony." *Moore's Federal Practice*, Vol. 3, page 3116.

It is further stated in *Moore's Federal Practice*, Vol. 3, page 3117:

> "Under the prior practice in the federal courts, the line of distinction as to fidings of fact and appellate review was between law and equity cases. Under the Seventh Amendment the findings of the jury could not, of course, be re-examined except in accord with the common law, and were therefore binding on the appellate court if sufficient evidence to support

them was found. And, even in law cases in which no right of jury trial existed or in which such right had been waived, the findings of fact had the same effect as the verdict of a jury. In equity cases the findings of fact were reviewable both as to the weight of the supporting evidence and the sufficiency; the review was both of fact and law.

Following the mandate of the Rule-Making Act, the Court abolished the distinction heretofore made between the law and equity practices; the distinction is now between jury and non-jury actions. Feeling that the function of the appellate courts was to promote justice on the facts of particular cases as well as to establish general uniformity in law, the fuller equity review of both law and fact was established for all non-jury actions. But as indicated by the wording of the Rule, the lower court's findings, because of the court's proximity to the trial and the opportunity afforded thereby to judge the credibility of witnesses, are to control unless clearly erroneous."

Construing Rule 52(a) the courts have been unanimous in their holding that where the findings of fact are against the clear weight of the evidence, such findings of fact are clearly erroneous and should be set aside. In *Fleming vs. Jalmer*, 123 F. (2d) 749, the court held, at page 751:

"A finding of fact is clearly erroneous if it is against the clear weight of the evidence. It does not suffice that it be supported by evidence." Citing Aetna Life Ins. Co. vs. Kepler, 8th Cir. 1941, 116 F. (2d) 1; State Farm Mutual Automobile Ins. Co. vs. Bonaci, 8th Cir. 1940, 111 F. (2d) 412; Manning vs. Gagne, 1st Cir. 1939, 108 F. (2d) 718; *Federal Rules of*

Civil Procedure and the *American Bar Institute Proceedings*, page 316 et seq. (Cleveland 1938); Clark & Stone Review of Findings of Fact, 4 U. of Chi. L. Rev. 190, 1937."

The United States Supreme Court in Cause No. 940 316 U. S. 662, 663, 86 L. Ed. 1739, denied writ of certiorari in the above cause, so that we think that decision unquestionably binding upon this Court. Furthermore, in National Labor Relations Board vs. Bell Oil & Gas Co., 98 F. (2d) 406, following Rule 52, the Court set aside the findings of fact of the trial court because they were not supported by the evidence. This principle of appellate procedure was ably discussed and approved in Eppenaur vs. Ohio Oil Co. 128 F. (2d) 363, holding that a finding of fact would not be set aside unless it was clearly erroneous, but indicating just as certainly that it would be if clearly erroneous.

The importance of correct findings of fact from the evidence is stressed far more forcibly than is counsel's ability so to do in U. S. vs. Forness, 125 F. (2d) 928, when at page 942 the court stated:

> "There were included in the record proposed findings and objections thereto. This was improper. Federal Rules of Civil Procedure, rules 52(a), 75(e) 28 U. S. C. A. following section 723c. Although we cannot condone this practice, it happens that in this case the inclusion of this material in the record seems to show that the appellant's objections were made not to the findings listed in the record as defendants' requests

to find, but rather to other proposed findings with which the findings of the district court are apparently identical. We have recently asked for 'brief and pertinent findings of contested matters * * * rather than the delayed, argumentative, overdetailed documents prepared by winning counsel'. Matton Oil Transfer Corp. vs. Tug Dynamic, 2 Cir., Dec. 1, 1941, 123 F. (2d) 999, 1001. Otherwise, we lose the benefit of the judge's own consideration. In the instant case, a comparison of the findings with the opinion seems to show that the findings proposed by the defendants were mechanically adopted, with the consequence that some of the findings made by the district court are not supported by the evidence and not substantially in accord with the opinion. Such a result can usually be avoided by following what we believe is the better practice of filing findings with the opinion when the evidence is still fresh in the mind of the trial judge, and permitting the parties to file objections under Federal Rules of Civil Procedure, rule 52(b). See Matton Oil Transfer Corp. vs. Tug Dynamic, supra.

We stress this matter because of the grave importance of fact-finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts as found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts. The latter type of error, indeed, can be corrected on appeal. But the former is not subject to such correction unless the appellant overcomes the heavy burden of showing that the findings of fact are 'clearly er-

roneous.' Chief Justice Hughes once remarked, "An unscrupulous administrator might be tempted to say 'Let me find the facts for the people of my country, and I care little who lays down the general principles.' That comment should be extended to include facts found without due care as well as unscrupulous fact-finding; for such lack of due care is less likely to reveal itself than lack of scruples, which, we trust, seldom exists. And Chief Justice Hughes' comment is just as applicable to the careless fact-finding of a judge as to that of an administrative officer. The judiciary properly holds administrative officers to high standards in the discharge of the fact-finding function. The judiciary should at least measure up to the same standards."

Then in Katz Underwear Co. vs. U. S., 127 F. (2d) 965, at page 966, the court said:

"In a case tried with a jury, Civil Procedure, rule 52(a), 28 U. S. C. A. following Section 723c provides. The relevant portion of the rule provides that, 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.' This rule permits review to the extent formerly allowed in federal equity practice. 3 Moore's Federal Practice, para. 5201, page 3118. In equity if it clearly appears that the court misapprehended the evidence, its findings of fact might be set aside. Pollock vs. Jamison, 63 App. Dec. 152, 70 F. (2d) 756."

In State Farm Mutual Automobile Ins. Co. vs. Bonacci, et al, 111 F. (2d) 412, it is held:

"It is urged that we are bound in this case by the findings of the lower court on these issues. Rule 52(a) of the Rules of Civil Procedure, 28 U.S.C.A following section 723c, is as follows: 'In all action tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court.'

The rule plainly contemplates a review by the appellate court of the sufficiency of the evidence to sustain the findings. If this were not true, the provision that requests for finding are not necessary 'for the purpose of review' would be meaningless. If the findings are clearly erroneous, the appellate court should set them aside, always giving due regard to the fact that the trial court had the opportunity of observing the witnesses. In Simkins Federal Practice, 3rd Ed., page 488, in commenting on the effect of Rule 52(a), it is said:

'The new practice, now incorporated in the Civil Procedure Rules, accords with the decisions in the scope of the review in modern Federal equity practice, and applies to all cases tried without a jury, whether legal or equitable in character, and whether

the findings is of a fact concerning which the testimony was conflicting or of a fact inferred from uncontradicted testimony.

'Under the new practice, where findings are made by the court without a jury, the appellate court is not limited to the mere question whether there is any substantial evidence to support them, but may set them aside if against the clear weight of the evidence, at the same time giving full effect to the special qualification of the trial judge to pass on credibility.' The rule with reference to review of findings of fact in equity cases has often been announced by this court. Johnson vs. Umsted, 8 Cir. 64 F. (2d) 316; Koenig vs. Oswald, 8 Cir., 82 F. (2d) 85; Lambert Lbr. Co. vs. Jones Engineering & Const. Co., 8 Cir. 47 F. (2d) 74; Chicago M. St. P. & P. R. Co. vs. Flanders, 8 Cir. 56 F. (2d) 114; First National Bank vs. Andresen, 8 Cir., 57 F. (2d) 17; United States vs. Perry, 8 Cir., 55 F. (2d) 819. In Koenig vs. Oswald, supra, we reversed the findings of the lower court in a fraud case because they were deemed to be contrary to the weight of the evidence, even though they were sustained by the spoken word from the witness stand. While the findings of fact are presumptively correct, they are not conclusive on appeal, if against the clear weight of the evidence. In Keller vs. Potomac Electric Co., 261 U. S. 428, 43 S. Ct. 445, 67 L. Ed. 731, the Supreme Court, in discussing procedure in an equity case, said: 'in that procedure, an appeal brings up the whole record and the appellant court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses'."

The court held in National Labor Relations Board vs. Bell Oil & Gas Co., 98 F. (2d) 405, and in a case of the same style, 98 F. (2d) 406, that it would not be bound by findings of fact based on irrelevant, immaterial and incompetent testimony. We contend that while the evidence tending to impeach, being the only testimony offered by appellees, may not be irrelevant and immaterial, but the courts have always held that such testimony has no probative force. That if it has any force at all, it can only be in a negative manner and is certainly incompetent upon which to base a positive finding of fact. All the positive testimony in this record is that the mineral deed here in question was signed by Kennemer and wife in blank; that there was no grantee named at the time it was signed; that there was no description of the property sought to be conveyed; and that neither Kennemer nor his wife ever in fact went before a notary public, or any other competent authority, to acknowledge it. The rule of evidence that positive testimony is to be given more weight than negative testimony is too well settled to permit of argument, but appellants call to the attention of this Honorable Court, for its convenience, should it care to review this rule, Jones on Evidence, Third Edition, pages 1422-1425, and cases there cited.

BRIEF OF THE ARGUMENT GERMANE TO SPECIFICATION OF ERROR NO. 13

The court held in Findings of Fact No. 10, (R. 243) that no claim was made by Kennemer and his wife, Lottie

Kennemer, that the conveyance which they had executed in favor of C. D. Davis, being the mineral deed here in question, was void or that there was anything irregular concerning its execution. Petitioners contend that this Finding of Fact is immaterial, since a void deed may be attacked at any time prior to its passage into the hand of an innocent purchaser without notice, but, on the other hand, if this Finding of Fact is not immaterial, and has any controlling weight in this cause, then the court certainly erred, to the prejudice of the substantial rights of the petitioners, in refusing to allow them to prove by the witness, Mrs. Bernice Robinson (R. 155, 157) that on the day of Mrs. Kennemer's death she, with her lawyer, was seeking proof from Mrs. Robinson concerning this very matter. The only reasonable conclusion to be deduced from the fact that Mrs. Kennemer, accompanied by one of her lawyers in this case, came to Mrs. Robinson's and asked her if she remembered the occasion of Judge Suiter coming to her place with the correction deed was that she was seeking testimony to be used in the trial of this case. Therefore, if the court's Findings of Fact No. 10 has any controlling weight in this cause, it certainly was error for the court to refuse appellants the opportunity to offer testimony to the contrary.

BRIEF OF THE ARGUMENT GERMANE TO SPECIFICATION OF ERROR NO. 14

Petitioners contend that since Billington sought the services of Milo Cain in his efforts to secure mineral deeds

in that vicinity, any statement that he made to his agent, C. D. Davis, in the presence of Milo Cain with reference to how the deeds were to be taken is material. Especially is that true since petitioners' contentions are that Davis was directed to take all the mineral deeds in blank, and Gilbreath, one of the respondents, had testified that he directed Davis to take the mineral deeds in the name of Billington. Then for the court to refuse to allow the testimony of Cain to the effect that Gilbreath had directed Davis to take all of the mineral deeds in blank, among which the deed here in question was included, was a material error and highly prejudicial to petitioners' cause.

RESUME

Succinctly stated, our position is that the alleged mineral deed from the Kennemers to Davis is void for three definite reasons: (1) There was no grantee named in the deed at the time of its execution; (2) there was no description of the property attempted to be conveyed in the deed at the time of its execution; and (3) neither Kennemer nor his wife appeared before a notary public to acknowledge the same.

The deed was never confirmed, because (1) a deed that is void and not voidable is incapable of being reformed and confirmed, and (2) neither the act of appellant in paying back the part of the lease bonus money nor the signing of the instrument correcting the field notes were adequate to do so. We contend that it is well settled that

an instrument to reform and confirm a deed must state specifically in what respect it reforms and confirms such deed, and must be excuted in the same way and under the same law and statutes that governed the execution of the original instrument.

We concede that the findings of fact of the trial court in this case may not be set aside unless they are clearly erroneous. On the other hand, we contend that just as surely, under the unanimous decisions of all the courts since Rule 52(a) went into effect, the appellate courts will set aside the findings of fact of the trial court where they are against the clear weight of the evidence. The avowed purpose of Rule 52(a) as above set out is to give the appellate courts authority to see that justice is done in the courts below, rather than to base their decisions upon the pure technicalities of the law. Unhampered by the former doctrine of "substantial evidence", it is not only the privilege but the duty of this Court to set aside the findings of fact against the clear weight of the evidence.

Since all the positive testimony in the record as above treated is that there was no grantee named in the deed at the time the Kennemers signed it, that there was no description of the property sought to be conveyed, and that the Kennemers did not appear in person before the notary public who is alleged to have taken the acknowledgment, the judgment in this case cannot stand under controlling authorities cited. The testimony of Judge Suiter (R. 161-170), taken at its face value, neither tends to

impeach these witnesses on any material issue nor tends to establish that the instrument he prepared in any way attempts to reform or confirm the void deed. Likewise, we contend that the effect of Mrs. Alice Niblack's testimony before her memory was "refreshed", corroborates the testimony of petitioners when she testified that, as she remembered that Davis said "He prepared the instruments in blank and took them to Milo Cain's office, and, as I recall, he said he left every one of those grantees blank in that, so that Mr. Cain or somebody down there could fill them in" (R. 187).

Billington's testimony (R. 196), which at best only tends to impeach, destroyed itself when he stated that Kennemer had told him that he brought his wife to Davis' office at Winnsboro along with the deeds from which the description was to be written into the mineral deed, that neither Craddock nor Davis was present, yet the deed was fully prepared and the description added, and that he and his wife went before C. W. Stevenson, a notary public, and duly acknowledged it. The undisputed evidence shows that Kennemer and his wife left town at noon the very day that they brought the deeds in and immediately after executing the blank deed, and never returned. It is undisputed that Davis and Craddock added the field notes in the deed from the original deeds which Kennemer brought in, and they testified that they did it late that evening or that night.

WHEREFORE, for the errors indicated, we pray for order of this Honorable Court reversing the judgment and action of the court below, and for such other and further orders consistent herein as may be deemed appropriate by this Honorable Court.

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